

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 01-1139 (JFK)
W.R. GRACE & CO., .
Debtor. .
USX Tower - 54th Floor
600 Grant Street
Pittsburgh, PA 15219
October 31, 2005
8:50 a.m.

TRANSCRIPT OF TRIAL
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

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1 THE COURT: Good morning.

2 THE CLERK: All rise.

3 THE COURT: Please be seated. This is the matter of
4 W.R. Grace, Bankruptcy No. 01-1139. Today is the time set for
5 an argument on certain objections to the claims filed by
6 Speights and Runyan on behalf of a number of entities. The
7 participants I have listed by phone John O'Connell, David
8 Seigel, Mark Schelnitz, David Parsons, William Sparks, Jasamad
9 Thomason (phonetic), Theodore Tacconelli, Daryl Scott, Mark
10 Hereford, Gary Becker and John Phillips. I'll take entries in
11 court. Good morning.

12 MS. BROWDY: Good morning, Your Honor. Michelle
13 Browdy on behalf of the debtors. With me is my colleague
14 Samuel Blatnick.

15 THE COURT: I'm sorry, would you say your name again?

16 MR. BLATNICK: Samuel Blatnick.

17 THE COURT: Thank you. Good morning.

18 MR. SPEIGHTS: Good morning, Your Honor. Dan
19 Speights on behalf of Anderson and with me is my colleague, Bud
20 Fairey.

21 THE COURT: I'm sorry, I'm having trouble hearing the
22 second names. I apologize.

23 MR. SPEIGHTS: Dan Speights and Bud Fairey.

24 THE COURT: Bud Fairey, thank you.

25 MR. SPEIGHTS: Thank you, Your Honor.

1 THE COURT: Okay.

2 MS. BROWDY: Thank you very much, Your Honor. Before
3 we begin, I'd like to hand up an agreed order for the
4 withdrawal and expungement of 1,495 asbestos property damage
5 claims. These are the claims without product ID and it's
6 through the stipulation we're able to moot the issue of a
7 California conspiracy claims which was otherwise going to be
8 heard this morning.

9 THE COURT: All right. Thank you. This doesn't have
10 a docket number related to it. Obviously, there's only one
11 item on the agenda, but I need a docket number.

12 MS. BROWDY: Yes, Your Honor. It would be related to
13 a 13th omnibus objection to the Speights and running claim
14 which would be Docket No. 9311.

15 THE COURT: Okay. Thank you.

16 MS. BROWDY: Thank you, Your Honor.

17 THE COURT: All right. That order's entered.

18 MS. BROWDY: Thank you, Your Honor. And as you can
19 see, I have a number of papers. If it's okay, I'd like to
20 address the Court from counsel table?

21 THE COURT: Sure.

22 MS. BROWDY: Thank you, Your Honor.

23 THE COURT: You can be seated if you'd like.

24 MS. BROWDY: I'll stand. Your Honor, we know how
25 busy this Court is and we appreciate you taking the time to

1 have this special hearing for us today. We wouldn't have asked
2 for it if we didn't think it was critically important to the
3 bankruptcy case. As we've told the Court before, we're
4 concerned, we believe that the Speights case -- the Speights
5 claims are really holding up the resolution of the Chapter 11.
6 And again, we wouldn't have asked for this special setting if
7 it wasn't of importance.

8 To walk through the claims issues this morning, I
9 have a few slides and I'd like to hand up a copy to Court and
10 to opposing counsel.

11 THE COURT: All right. Thank you.

12 MS. BROWDY: Your Honor, we've known for sometime now
13 that there are problems with the Speights claims. As we noted
14 for the Court in July that although there was only a handful of
15 property damage claims pending at the time of the filing of the
16 Chapter 11, in response to the notice of the bar date, we
17 received more than 4,000 claims and 3,000 of those, or 75
18 percent, were signed and filed by lawyers from the Speights
19 firm. We knew the numbers were off. We didn't understand
20 exactly why.

21 When the verified 29 team statement came in, we
22 started to realize there were some significant problems of the
23 authority to file those claims. We were able to report to the
24 Court by September that having dug more deeply into the
25 property damage claims and filed our objections, the onerous

1 objection to all claims, that, in fact, of the 4,000 claims,
2 only 3400 or so were what we call traditional asbestos property
3 damage claims. The remainder were things like Category Two
4 claims for milling and mining operations. There were people
5 who submitted medical monitoring requests on property damage
6 claims form and the like.

7 So really, again, it was just about 3400 claims that
8 were what we would call traditional property damage claims.
9 And the Speights firm was responsible for 85 percent of those
10 claims.

11 And as you can see in the third bar in this chart,
12 Your Honor, we have been working diligently to try to resolve
13 claims without taking up this Court's time. In fact, we have
14 another 100 claims withdrawn just from the last time I appeared
15 before Your Court -- this Court last week, Your Honor, and we
16 have gotten rid of almost half of the claims that were filed.
17 And we're now to the point where there's roughly 1800 property
18 damage claims.

19 And still, even after withdrawing more than 1700
20 claims, including the 1500 that we handed up to Your Honor this
21 morning, Speights still has two-thirds of all property damage
22 claims filed in this case. That's not twice as many claims as
23 any other individual claimant. That means this firm signed and
24 filed twice as many claims as all the other traditional
25 property damage claimants in this bankruptcy put together.

1 Something's wrong here.

2 Now, we've told Your Honor that we're going to try to
3 break this into manageable pieces and we think, again, there's
4 problems with all of these Speights claims. They're dealing
5 with the Anderson Memorial issue, allows us to address, again,
6 with a simple legal argument 600 claims, just, again, by virtue
7 of visiting with you here today. So, there's certainly
8 problems in the remaining Speights claims, but our focus this
9 morning is going to be on the Anderson Memorial claims.

10 Before we dive into the legal argument, Your Honor,
11 I'd like to give, again, the Court a flavor of how we tapped
12 into these Anderson claims and how we know that there are
13 problems in them.

14 As we told the Court in the 13th omnibus objection
15 which is challenging the authority of the Speights firm to file
16 these claims, we had so many claims from that firm, it was just
17 hard to get our arms around what was even in there. What do
18 you do with 3,000 claim forms.

19 So what we did over the summer, Your Honor, was we
20 chose randomly 10 claims and we figured let's pull some claims
21 up, do some discovery, see what's in there and it will give us
22 a better flavor for what's in the mix of these 3,000 claim
23 forms. And one of the claims that we chose was the American
24 Medical Association. Again, we chose 10 or so, all spelled out
25 in our 13th omnibus objection.

1 And like the other 3,000 claims submitted by the
2 Speights firm, this was signed by a Speights attorney. Again,
3 all the claims submitted by Speights were filed either by --
4 were signed either by Dan Speights or his colleague. And
5 again, the claim form was approved by this Court. It has to be
6 signed under the penalty of perjury saying that the statements
7 are true, correct and not misleading.

8 And again, we took discovery of this handful of
9 claimants and found -- we've attached to the opening brief of
10 this matter in Exhibit 4 the responses we got to that
11 discovery. And I think you'll see that eight of the ten people
12 we asked said that Speights had not had permission from them to
13 file the claims. And I've chosen just one example here. It's
14 an affidavit from the American Medical Association. I've blown
15 up paragraphs three and four. But again, the whole affidavit
16 is attached to our opening brief as Exhibit 4.

17 And the American Medical Association testified, but I
18 spoke with various representatives of the law firm of Speights
19 & Runyon in late 2002 and early 2003. The subject of
20 discussion was whether Speights & Runyon would represent the
21 AMA in this bankruptcy proceeding. I informed Speights &
22 Runyon that the AMA did not wish Speights & Runyon to represent
23 it in this proceeding. Based on inquiry, I believe that no AMA
24 representative authorized Speights & Runyon to file a proof of
25 claim on behalf of the AMA or otherwise represent the AMA in

1 this or any other proceeding. And again, this is the AMA. We
2 saw the signed, submitted proof of claim form submitted by the
3 Speights firm. And again, this is just one of a handful of
4 examples that we got when we started to make this
5 investigation.

6 In response, Your Honor, we had briefing on the 12th
7 and 13th omnibus objections which were challenging the
8 authority of Speights to bring these claims. And what we got
9 was an admission from the Speights firm. This is a page from a
10 brief that they filed in August that says, you know what, for
11 1,000 of these claims, the individuals either haven't responded
12 to a request for expressed authorization or we haven't even
13 been able to locate them. So it took more than two years from
14 the time that claims came in for us finally get the admission
15 that what Speights had done was submit individual claim forms
16 on behalf of people they couldn't even contact, couldn't locate
17 and who had given them expressed authorization.

18 And that led, Your Honor, to the briefing and
19 argument that brings us here today. And we got the order from
20 this Court in September demanding that Speights identify with a
21 list of all pending product -- property damage claims filed by
22 Speights & Runyon for which Speights & Runyon relies on the
23 Anderson Memorial Hospital case as its sole authority to file
24 such PD claims.

25 So, that's how we got here and we've attached as

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1 Exhibits 1 and 2 of our opening brief the lists of claims that
2 the Speights firm produced in response to this order. Exhibit
3 1 is a list of the claims outside of the State of South
4 Carolina that are supposedly filed under the authority of
5 Anderson Memorial. And Exhibit 2 are the claims for billings
6 inside the State of South Carolina for which the Speights firm,
7 again, has no expressed authority, but in response to this
8 court order, said, we filed these under the sole authority of
9 the Anderson Memorial case. So we're here today to disallow
10 and expunge the claims on Exhibit 1 and 2.

11 Now, as we indicated, I believe, in a footnote to our
12 opening brief, Your Honor, there's a little slippage, I think
13 there's about 50 additional claims that the debtor's believe
14 were filed under the authority of Anderson Memorial. I've
15 provided that list to the Speights firm and I'm sure we can
16 sort out those mechanical issues later on.

17 But again, this is how we ended up teeing up this
18 Anderson Memorial issue to be decided by the Court. Now,
19 there's been a lot in the briefs about the American Reserve
20 case and we certainly saw at some length in the Speights
21 response papers, gee whiz, American Reserve and other cases
22 made clear that you can have a class proceed in a bankruptcy.
23 And I think it's important to bear in mind, Your Honor, we're
24 not here on a referendum as to whether or not a class can
25 proceed in a bankruptcy. American Reserve and a number of

1 other cases say, or have said, that you can, but it's very
2 clear in American Reserve and the other cases; I would cite the
3 Ephedra case in our brief, I would cite the Zenith case in our
4 brief, I would cite the Kaiser and Weed cases that I believe
5 Mr. Speights cited; and, of course, the American Reserve
6 decision itself which is for those courts that do permit a
7 class action to go forward, you have to come to the bankruptcy
8 court and get permission. This is a decision that's in the
9 discretion of the bankruptcy court. None of these decisions
10 say that you can simply submit individual claim forms and sign
11 them under the penalties of perjury on behalf of claimants that
12 you've never met and that you don't represent.

13 Again, American Reserve makes very clear, you got to
14 come first to the bankruptcy court. And, Your Honor, this
15 Court recognized as much as well. In fact, we've attached as
16 Exhibit 3 some -- of our reply brief some excepts from the
17 February 25th, 2002 hearing, almost four years ago, where this
18 Court was expressly addressing the issue of the claims form,
19 the notice in the bar date for property damage claims. And
20 this Court could not have been more clear, page 107 to 108, "If
21 you're going to request that a class proof of claim be filed, I
22 need an appropriate motion by a representative of the putative
23 class by a law firm that is competent to handle it. Until I
24 get such a motion, there will be no class proofs of claim
25 because I think that's what I need."

1 And the discussion went on to page 110, "Unless and
2 until I get that motion, there will be no class proofs of claim
3 because I think that's the way I need to get it raised." That
4 was almost four years ago. Again, the Court was clear, if you
5 want to proceed on a class-wide basis, you've got to come to
6 me. And that's fairly consistent with American Reserve and the
7 other cases cited.

8 But Your Honor, that's not what Speights did. The
9 Speights firm, ignoring the dictates from this Court, submitted
10 Claim 1108 -- 11008, I'm sorry, an individual proof of claim
11 for Anderson Memorial Hospital itself. And in fact, Mr.
12 Speights response papers submit some apparent authorizations
13 that would suggest that individually, Anderson Memorial
14 Hospital is a proper claimant of Mr. Speights.

15 But then, again, ignoring what this Court said,
16 Speights submitted Claim 9911 and 9914, both of which are
17 attached to our reply briefs. They are purported class-wide
18 proofs of claim, again, in direct violation to what this Court
19 said. 9911 is a purported class proof of claim for out-of-
20 state claims. 9914 is a purported class proof of claim for in-
21 state claims.

22 And, Your Honor, if that's all that Mr. Speights had
23 submitted, we probably could have brought this matter to the
24 attention of the Court months, if not years ago. But that's
25 not what Speights did. In addition to those, we got hundreds

1 upon hundreds upon hundreds of additional individual claims.
2 And again, it's taken us years to find out that these
3 additional, more than 600 out-of-state claims and more than 50
4 South Carolina claims, signed and filed as individual, separate
5 claim forms, that those are supposedly filed under the
6 authority of Anderson because again, that's not what Speights
7 came out and said he did. It took us -- again, discovery, it
8 took us the 2019 statement, it took us an order from this
9 Court, it took us years to figure out that that's what these
10 claims are.

11 And if there's any question, Your Honor, that Mr.
12 Speights had no authority from this Court to go forward on a
13 class-wide basis, Docket Entry 10014, the motion for class
14 certification filed a week ago last Friday proves it. I mean,
15 it was stunning. If you saw the response papers, one of the
16 exhibits was, gee, I'll move now for class certification. The
17 Court told any claimant or the Court told the attorneys at that
18 hearing in February of 2002, Mr. Speights was there, if you
19 want a class proof of claim, come to me. And he waited till
20 years after the bar date had passed, and years after he had
21 signed and submitted these individual claim forms.

22 And, of course, what Speights didn't tell you was,
23 again, look at Claim 9911 or 9914 which are attached to our
24 reply brief, in direct violation of this Court's order, they
25 submitted these class proofs of claims on behalf of buildings

1 under supposedly the authority of the Anderson Memorial case.
2 But again, I don't think we'd have nearly the problems that we
3 do today if that's all that he had submitted because what
4 happens when you don't file the dictates of American Reserve,
5 what happens when you don't come to the bankruptcy court to try
6 to seek permission to go forth on a class-wide basis? Well,
7 we've learned that when you submit hundreds upon hundreds of
8 individual claim forms for people you don't represent, you have
9 problems.

10 You go -- and again, the opening brief at Exhibit 4,
11 you go and you talk to those claimants and they say, I never
12 approved this, I never authorized this claim to go forward.
13 You get claim forms submitted with false information. I've
14 given a couple examples that I'll go through here, but you can
15 look at thousands of claim forms submitted by the Speights firm
16 have false information. Question 18, when did you first know
17 of the presence of asbestos in the property of the Grace
18 product for which you're making this claim? Answer, 2003.
19 Question 20, when did you first learn that the Grace product,
20 for which you are making this claim, contained asbestos.
21 Answer, 2003.

22 Your Honor, this information was filled in on behalf
23 of what Speights has admitted was at least a thousand claimants
24 they've -- he's never met. They didn't respond to requests for
25 authorization. They couldn't find the addressees. How can you

1 possibly know the date that this information became available.
2 This is purely fabricated information.

3 And, Your Honor, what's most telling is now Speights
4 is saying, well, I submitted all these individual claim forms
5 under the authority of the Anderson Memorial case. The
6 Anderson Memorial case was filed against Grace in 1992. So at
7 least if you were going to be honest about that and say these
8 individual claim forms were submitted on the basis of Anderson
9 Memorial, he should have written the date 1992. But instead,
10 this is, again, purely fabricated information. Of course,
11 these people didn't learn this information in 2003. We have no
12 idea what these claimants knew because Speights and the debtors
13 and the Court have never spoken with them. Speights simply
14 manufactured this information. And it's replete on thousands
15 of these claim forms.

16 They're asked when were renovations made? Oh, there
17 were multiple renovations over various years. What product do
18 you have? Only surface treatment. Who -- in what manner were
19 the Grace products modified or disturbed? Oh, it was affected
20 by numerous custodial and maintenance activities renovated --
21 in renovations. This is purely manufactured responses. You
22 can look at claim form after claim form after claim form and it
23 will have these same generic responses, or really generic non-
24 responses because Speights had to make it up because that's
25 what happens when you submit individual claim forms for

1 claimants you've never met.

2 We also learned, for example, when we objected to a
3 number of these claims as having been previously settled, the
4 Speights firm came back to us and said, you know, prove it.
5 Where are these settlements. And that seemed a little odd
6 because you would think that if you had settled the claim, you
7 would know it. And then we realized that the problem arises
8 because, again, Speights submitted individual claim forms for
9 parties he doesn't represent. So you'll see we attached in
10 Exhibit 4 a letter response which says we've gone back to these
11 claims. The settlements we're talking about were executed with
12 other firms, not you. We can't disclose it to you. These are
13 confidential. That's what happens when you submit claim forms
14 on behalf of people you don't represent.

15 And we have another example in our opening brief at
16 Exhibit 4, a sample of a letter that we got back in December of
17 2004 where Laborers 310 said, gee, I noticed a claim that
18 appears to have been filed on behalf of my client without
19 authorization because again, these are the kinds of problems
20 that you run into when you don't file American Reserve and you
21 just go ahead and hand in thousands of claim forms on behalf of
22 people you've never met.

23 With that background, then, Your Honor, it takes us
24 to the two straightforward issues that the Court's being asked
25 to addressed today. First, did Speights have authority to file

1 hundreds of out-of-state claims based on Anderson Memorial.
2 And then the second issue is whether Speights had authority to
3 file the South Carolina claims. So I'm going to focus first on
4 the out-of-state claims.

5 And again, we didn't learn until the verified 2019
6 statement that even what the purported was for the filing of
7 these claims. So let's start with the out-of-state claims.

8 If you go to the Speights' verified 2019, Speights
9 attaches the 1992 original complaint from the Anderson Memorial
10 case. And in the Anderson Memorial case, Speights went to its
11 home court, its home county of Hampton County, South Carolina,
12 filed a putative class action for essentially all the buildings
13 in the world. They're not even limited to U.S. buildings.
14 But, for simplification, let's say it sought class
15 certification for out-of-state buildings and in-state
16 buildings. And again, that was filed in the home state, South
17 Carolina, in 1992.

18 And again, if you look at the verified 2019
19 statement, it attaches a copy of this 1992 complaint and you'll
20 see that on slide 20, I've circled the little C because that's
21 the index that we're given in the 2019 statement because then
22 you look for entry after entry after entry and for those
23 buildings, if there's a little C, then those cases were
24 supposedly filed under the authority of this original complaint
25 from 1992.

1 What Speights 2019 statement doesn't disclose to the
2 Court, Your Honor, though, is that more than 10 years ago, the
3 Hampton County, South Carolina court was asked to certify the
4 class and struck all out-of-state buildings from the class.
5 This was the August 8th, 1994 opinion from the Hampton County
6 court. We've attached it to our opening brief at Exhibit 7.
7 That wasn't referenced in the 2019 statement. But this order
8 makes clear that the out-of-state buildings were not recognized
9 as a class in South Carolina.

10 Similarly, Speights' 2019 statement didn't tell you
11 that in May of 1996, the court in South Carolina, when asked to
12 reconsider the issue, said, no. The August 8th, 1994 opinion
13 is adapted in full through the execution of this order. So the
14 South Carolina court, not once, but twice rejected the notion
15 that out-of-state claims could go forward in South Carolina
16 and, in fact, struck those claims. And the basis for that,
17 Your Honor, is what they have down there called the door
18 closing statute that essentially an out-of-state claimant can't
19 use a state court to sue an out-of-state defendant. So again,
20 the Anderson Memorial state court opinion through out the out-
21 of-state claims.

22 What Speights didn't tell you in the 2019 statement
23 is that the complaint the Speights firm attached is not even
24 operative. There's a second amended complaint from 1996 tha's
25 limited to in-state buildings. But that's not what Speights

1 attached to 2019 statement. It was instead attaching the 1992
2 complaint that has been rejected and superceded.

3 Speights also didn't tell you in the 2019 statement
4 that in April 2003, more than a year and a half before that
5 2019 statement was due, that the South Carolina Supreme Court
6 in the Farmer v. Monsanto case held that the door closing
7 statute prevented non-residents whose cause of action did not
8 arise in state from joining class actions against foreign
9 corporation. The Supreme Court of South Carolina has addressed
10 this issue and agreed with the trial court in the Anderson
11 decision saying the door closing statute prevents these out-of-
12 state claims from going forward.

13 Speights knew about the Farmer v. Monsanto, Speights
14 was on the brief for their respondents. And in fact, it's
15 interesting, Your Honor, if you look at the response brief that
16 the Speights firm submitted, instead they tried to hand up the
17 unpublished opinion from the trial court judge in the Farmer
18 case that got turned over by the South Carolina Supreme Court.
19 It was clear by the time the glorified 2019 statement was
20 submitted that there was no basis for going forward in a state
21 court class action against these out-of-state residents. It
22 was absolutely clear that there was no authority to file those
23 out-of-state claims.

24 I think we're also going to heard the word thrown a
25 lot -- thrown around a lot on the response argument. I was a

1 fiduciary, I had a fiduciary responsibility to go forward on
2 behalf of these putative class members. And I would just point
3 out, Your Honor, the Court invited claimants in the 2002
4 argument, if you're going to go forward on a class, come to me,
5 I need a motion, I need to consider it. And Speights never did
6 that. Speights simply went ahead on his own and submitted
7 these individual claim forms that we had to dig through for
8 years to figure out what was the real basis.

9 And what I thought was interesting here, Your Honor,
10 is when we finally started to take discovery over the summer
11 and started to get into what was behind these claims form, all
12 of a sudden Speight started to withdrawing, withdrawing claims
13 that were filed under the authority supposedly of the Anderson
14 Memorial decision. And I've attached a list of dozens of these
15 individual claims that got withdrawn in June and July while
16 supposedly Speights was representing these basis on -- these
17 claimants on a class basis. I mean, it just shows I'll
18 represent them when its convenient, I'll pull them when it's
19 convenient.

20 And the last thing I want to address, Your Honor, on
21 the out-of-state claims is the issue of Central Wesleyan
22 because I expect that Speights is going to raise this as he has
23 in his papers and in the brief argument we did back in August.
24 In the Central Wesleyan decision, there you had a federal court
25 in South Carolina wedding on a conditional basis a Class 4

1 forward. And the federal court said, well, the door closing
2 statute isn't going to apply to us. We can go forward. And
3 what Speights doesn't tell you is that not only the Farmer v.
4 Monsanto, the South Carolina Supreme Court, not only did they
5 expressly consider Central Wesleyan, but the Anderson Memorial
6 case, if you look at the final order, they expressly looked at
7 the Central Wesleyan decision and says, it doesn't apply here.
8 Central Wesleyan was what was going on in federal court. The
9 door closing statute talks about what you can do in the South
10 Carolina state courts.

11 Well, what Speights has told this Court in the 2019
12 statement and in the briefs I have the authority to go forward
13 in this bankruptcy court because I had permission from the
14 state court. Speights isn't bringing a federal court action
15 from South Carolina up to this court. He's trying to bring a
16 state court action and the state courts held Central Wesleyan
17 doesn't apply, the door closing statute does, out-of-state
18 claims can't go forward.

19 So the bottom line, Your Honor, on the 600 or so
20 individual claims submitted from out-of-state supposedly under
21 the authority of Anderson Memorial, Speights has no state court
22 order certifying that class. He has no federal court order
23 certifying that class. He has no order from this Court
24 permitting those claims to go forward on a class basis. He has
25 no permission from the individual claimants to go forward on

1 their behalf. And that class was never certified. There was
2 never notice and opportunity to opt out. It's -- essentially
3 what Speights is here saying, give full faith and credit to the
4 out-dated, rejected, superceded 1992 class action complaint
5 that I filed. And on that basis, I should have authority to
6 file hundreds upon hundreds of claims for people I've never
7 met. Totally flies in the face of American Reserve and this --
8 what this Court recognized in 2002 and all of those out-of-
9 state claims should be disallowed and expunged.

10 I want to move on now to the in-state claims, Your
11 Honor. In support of filing dozens of South Carolina claim
12 forms on behalf of building orders that Speights had never met,
13 if you look at the verified 2019 statement, the Speights firm
14 cites and attaches three orders; a February 9th, 2001 order, a
15 June 18th, 2001 order and a July 5th, 2001 order. And those
16 are all attached to Speights verified 2019 statement.

17 And then if you go down the list of the individual
18 claims in the 2019 statement for all those South Carolina in-
19 state buildings, he'll cite to these three orders. And for the
20 Court's convenience, we've attached these as Exhibits 11, 12
21 and 13 to our opening brief.

22 But what Speights doesn't tell Your Honor is the
23 February 9th opinion was a conditional ex parte order and that
24 the June and July orders were ultra vires because they post-
25 date the filing of this bankruptcy and they would violate the

1 automatic stay as to Grace. And I just want to visit a little
2 bit about a couple of these orders.

3 The February 2001 order, Your Honor, I think is worth
4 looking at. Remember, the Anderson complaint was originally
5 filed in state court in 1992. By 1994, the state court had
6 struck all out-of-state claims so the focus was just on in-
7 state buildings. But nearly 10 years have passed and there was
8 no order from the court granting certification of South
9 Carolina class.

10 And again, what the Speights 2019 attaches is this
11 February 9th order that says, I'm going to conditionally
12 certify this. And when you look at the first sentence, it
13 says, Anderson Memorial Hospital has petitioned this court for
14 emergency relief which is based on the verified petition of
15 counsel and the court decides that under the circumstances, the
16 court's going to take the ex parte request as okay. And he
17 again conditionally certifies the class.

18 But what's stunning, Your Honor, is the verified
19 petition, signed and submitted by Mr. Speights, that led to
20 this conditional ex parte offer -- order, and Your Honor, I
21 know you have a lot of reading to do, if you don't have a
22 chance to read anything else, I would commend to you Exhibit 10
23 of our opening brief which is Speights' request essentially to
24 avoid the automatic stay that is anticipated to be coming down
25 from this Court. If you look at -- again, remember the ex

1 parte conditional emergency order is entered on February 9th.
2 What happened on February 8th of 2001 was that the Speights
3 firm submitted an emergency petition for a rule to show cause
4 why a conditional class should not be certified against W.R.
5 Grace and Company and W.R. Grace and Co. Com.

6 And what's the basis for getting this emergency class
7 certification? And again, I'll quote the petition from
8 Speights. "Grace disclosed last week that it may be forced to
9 file for bankruptcy protection and have to seriously consider
10 reorganization under Chapter 11. Once Grace files for
11 bankruptcy, this court may be deprived of jurisdiction." So
12 essentially, Speights is running into his home court in South
13 Carolina and saying, you know what, Grace is going to go into
14 the tank. If that happens, you're not going to be able to
15 certify the class, you're going to lose jurisdiction. So
16 you've got to go ahead and do it now.

17 And look at the verification. Again, this is what's
18 pretty stunning. Look at the verification that's attached to
19 that February 8th request for relief. It's submitted,
20 verified, Daniel Speights, being duly sworn, verifies the
21 following, and again this is all attached to our opening brief
22 at Exhibit 10. Speights tells the South Carolina court under
23 oath, "based on my experience, representing asbestos property
24 damage claimants in bankruptcies filed by Johns-Mandville
25 National Judgement and Celotex, bankruptcy courts treat

1 previously certified class claims much more favorably than
2 other claims. Absent conditional certification prior to
3 bankruptcy filing, a bankruptcy court may not grant the South
4 Carolina building owners the preferential class treatment this
5 court may determine they deserve."

6 And Your Honor, I just ask you to consider what the
7 -- Mr. Speights is doing here when he says, gee, I'm acting as
8 a fiduciary, I have to do this on behalf of the class. Compare
9 what he's doing with what American Reserve says. American
10 Reserve says, if you want to go forward in the bankruptcy, you
11 come to the bankruptcy court. The bankruptcy court has
12 discretion. It will take factors into account. Come to me and
13 I'll make the decision. And instead, you have Speights running
14 into court in South Carolina to try to deprive this Court from
15 making its decisions and to tell the South Carolina court, I
16 want to be treated more favorably. You better hurry up and
17 enter this order before the automatic stay goes into effect and
18 you lose jurisdiction. That's what this February 8th petition
19 is saying.

20 And then look to the other orders that Mr. Speights
21 attaches to the 2019 statement, they're from June and July of
22 2001, those are ultra vires, Your Honor. Those violate the
23 automatic stay. They're entered after Grace went into
24 bankruptcy. Those orders again are attached to the 2019
25 statement can't apply to Grace. They're, again, ultra vires.

1 Speights also doesn't mention, when he attaches these
2 to the 2019 statement that the South Carolina class was an opt-
3 out class that not notice or opportunity to opt out was ever
4 given.

5 And then, Your Honor, at the hearing we had in
6 August, Mr. Speights made a rather stunning revelation which is
7 I know all about this July order because I drafted it. And
8 Speights came and told the Court that's how it's done in South
9 Carolina, but honestly, I have no doubt that that is how it's
10 probably done in Hampton County, South Carolina. And Speights
11 says, the judge came to me and said draft the order and I did
12 it.

13 Well, after -- and again, he presented that order to
14 the Court at that August hearing. And afterwards, I went back
15 and got a full copy of that order. What that order says is,
16 please draw an order for my review -- and stop the order
17 rather, it's a request from the South Carolina trial court to
18 Mr. Speights saying draft up this final order. But the court
19 tells Mr. Speights in this letter, it's attached as Exhibit 18
20 to our opening brief, "please draw an order for my review
21 granting plaintiff's motion for class certification as
22 requested. The order should specifically state that the order
23 affects only the three remaining defendants due to the stay as
24 to W.R. Grace. I'm not sure, but my order may run afoul of the
25 stay."

1 So clearly the South Carolina court was concerned, we
2 can't make this ruling apply to Grace because they're in
3 bankruptcy. It would violate the automatic stay. But Speights
4 attached it, again, to his 2019 as part of the basis for his
5 authority for filing these claims for individual claimants in
6 this Court. Your Honor, there are two possibilities, either
7 that order supposedly applied to Grace and Mr. Speights drafted
8 it up and that was a willful violation of the automatic stay.
9 Or alternatively, Mr. Speights knew it didn't apply to Grace
10 and was trying to mislead the court, this Court, and the
11 debtors when he attached it to their filed 2019 statement.
12 There is no other explanation.

13 Of course Mr. Speights purports to rely on that
14 order. He attached it to the 2019 statement. He cited it in
15 his 2019 statement. He raised it with the Court. And it was
16 purely, Your Honor, in violation of the automatic stay. And,
17 Your Honor, as we indicated in our opening papers, Mr. Speights
18 should be particularly sensitive to this because we know from
19 the Dana (phonetic) opinion that we cited in our paper that
20 he's already been tagged by a federal court for having violated
21 the automatic stay, by running down to the Anderson court in
22 South Carolina and trying to get orders that violate the stay.

23 I -- just don't take my report. Read the Dana
24 decision which is cited in our opening paper. Speights knows
25 about this, knows there are problems with potentially

1 violating the automatic stay. He's represented to this Court
2 and to other courts, he's experienced bankruptcy counsel, he
3 should know better than this.

4 So the bottom line is did Speights have the authority
5 to file claims for the in-state claimants. The February 2001
6 order was conditional ex parte order designed to evade the
7 automatic stay. The other 2001 orders were ultra vires. They
8 were drafted by Speights in violation of the order -- of the
9 automatic stay. There was no order from this Court permitting
10 him to file on behalf of South Carolina claimants. He had no
11 permission from the claimants themselves. It was supposedly an
12 opt-out class. They had no notice of the opportunity to opt
13 out. Claimants rights -- didn't have authority to file those
14 claims for the South Carolina claimants.

15 I just have one more point to make, Your Honor, and
16 then I'll sit down. I want to discuss briefly the Celotex case
17 because I expect that Mr. Speights is going to raise it.
18 They've raised it in their papers and it was raised in the
19 August hearing. And as we indicated in our reply papers, I
20 just think that the Celotex orders have been thrown around by
21 the other side in a misleading way in this Court.

22 Speights now has twice cited to this Court a May 1996
23 order from Celotex and I sat in that hearing in August and I
24 thought it sounded like he was saying that the Celotex court
25 has already decided in a bankruptcy context the issues that

1 this Court is being asked to decide. And that would be pretty
2 persuasive authority, I would expect, Your Honor.

3 So we went back to look to try to figure out what
4 actually did happen in Celotex. And it turns out that this
5 May 1996 order that Speights has now cited to the Court twice
6 is an agreed order that the parties agreed to entry of after
7 negotiations and it does reference the Anderson Memorial case.
8 But there was no adjudication by the Celotex court as to
9 whether or not Mr. Speights had authority to represent the
10 Anderson Memorial, quote, unquote, class claimants. It wasn't
11 a contested matter before Celotex.

12 And similarly, the December '96 order that Mr.
13 Speights cited in August and attached to his paper again, there
14 was no adjudication of the issues faced in this Court.
15 Instead, again, we had to go back and dig out these facts, but
16 we found, and we've attached it to our reply brief at Exhibit
17 5, that in fact there is a pending adversary complaint, a
18 proceeding in Anderson Memorial, challenging this very issue.
19 And again, we've attached a copy of this complaint at Exhibit
20 5. It was updated as recently as last month. I believe the
21 adversary proceeding was initiated in 2002. And it's an
22 amended complaint for declaratory relief as to asbestos
23 property damage claims submitted by Anderson Memorial Hospital.

24 And if Your Honor looked at the complaint, we've
25 pulled out in particular paragraph 21, but again, the whole

1 thing is attached to our papers, what's been challenged here?
2 To the extent that Anderson filed the disputed claims as a
3 representative for a putative class action or a group claimant
4 as defined by the PD Claims Procedures, the PD Claims
5 Procedures do not provide any specific right or authority for
6 Anderson to file the disputed claims on behalf of the owners of
7 the buildings. It's the same contested issue that we have
8 here. The Celotex court hasn't decided this yet.

9 Speights hasn't told you, also, that Celotex isn't
10 paying on the disputed Anderson claims and we have a letter to
11 that effect attached as Exhibit 6. And Speights also doesn't
12 tell you, by the way, that if you look at the disputed claims
13 attached to that adversary proceeding in the Celotex case and
14 you look at the claims he's submitted here, there are dozens
15 where he's seeking double recovery. He's telling both sides
16 that they provided the fire proofing in the same buildings.
17 There are all kinds of problems with Speights references to the
18 Celotex, Your Honor, and we can only imagine what else we'd
19 learn if we get the opportunity to take discovery of Speights
20 firm.

21 The bottom line, Your Honor, is that we're asking
22 this Court to disallow and expunge all claims purportedly filed
23 on the basis of the Anderson Memorial complaint. That's Claims
24 9911 and 9914 which are purported class proofs of claim filed
25 expressly in violation of this Court's order. But it's also

1 the hundreds of individual claims identified as Exhibits 1 and
2 of our opening briefs which are the claims that Mr. Speights
3 admitted, based on the court order entered on September 23rd of
4 this year saying you've got to tell us what claims were filed
5 solely under the authority of Anderson Memorial. Those are his
6 lists attached to Exhibit 1 and 2.

7 We also ask Your Honor, we think that fees and costs
8 are appropriate for all this investigation. There's just so
9 much improper behavior going on on the other side that we think
10 clearly we make the statutory basis for receiving fees and
11 costs.

12 And finally, Your Honor, we think that the October
13 21st motion for class certification, Docket 10014 should be
14 struck. The Court framed the issues on the PD class and the
15 notice and the like -- the PD notice and claim forms in 2002.
16 The claims have been in since 2003. This is just another
17 attempt by Speights to delay, to stretch out these proceedings.
18 This motion for class certification is three years too late.
19 We shouldn't have to spend the time and money of the estate
20 responding to that motion. Thank you, Your Honor.

21 THE COURT: Mr. Speights.

22 MR. SPEIGHTS: May it please the Court, I came here
23 to argue the law, Your Honor. I came here to argue the law
24 because that's what we agreed to hear first. And I say at
25 almost at every turn, that I'm going to refrain from dealing

1 with all of these spurious, factual allegations that not only,
2 in many cases, are false or incomplete or misleading, but which
3 have nothing whatsoever to do with the two purely legal issues
4 which are before you today.

5 That's why I was so careful when we were together in
6 Wilmington the last time when we scheduled this to tell Your
7 Honor that they can tee up whatever they want. We have agreed
8 to tee up the legal issues first which require no discovery.
9 And if they go into facts of discovery, I'm going to stand up
10 at this hearing on October 31 and say, wait a minute, Your
11 Honor, all we have is two legal issues. And I have my
12 argument. I actually typed it yesterday when I got into
13 Pittsburgh which is purely the law of whether we had the legal
14 authority to file those class claims on behalf of Anderson
15 state and Anderson putative.

16 But at some point, Your Honor, I've got to say
17 something about all of this. Actually, I was thinking as I
18 heard counsel go on and on and was trying to write down
19 feverishly all the misstatements, that what I would really like
20 is a copy of this transcript so that I could annotate it for
21 Your Honor and tell you at every turn -- what Grace says is
22 either wrong or misleading or incomplete. And that's not what
23 we should be doing today, but I just wrote down feverishly just
24 a few points.

25 We have gotten rid of 1,000 claims or whatever. I'm
J&J COURT TRANSCRIBERS, INC.

1 the one who called W.R. Grace and suggested to do what I had
2 suggested doing with Mr. Fink, the gentleman in the first row
3 here who I've dealt with for a number of years, of dealing with
4 those conspiracy claims. It wasn't Grace. It had nothing to
5 do with authority. It had to do with my views on conspiracy.
6 And I would be glad to explain that, if it were relevant.

7 They say, we couldn't get our arms around this, there
8 were so many problems. They didn't have problems getting their
9 arms around this, Your Honor. The fact is, I've been talking
10 -- the fact is the claims themselves refer to Anderson Memorial
11 Hospital, all of these buildings, 600 buildings in dispute,
12 referred to Anderson Memorial Hospital complaint. The fact is
13 that I was talking to Grace. The fact is that in November of
14 2003, shortly after the bar date, I met with Mr. Fink and he
15 already had one of his spreadsheets and he had all of these
16 objections analyzed, et cetera, et cetera.

17 They knew what was going on. And what happened was,
18 after the deal fell through for reasons not my fault, I
19 supported the deal. After the deal fell through, Kirkland and
20 Ellis, maybe rightly, maybe wrongly, I'm not here to criticize
21 them, decided to go to war. And so my discussions with Mr.
22 Fink and Mr. Beber (phonetic) in early 2005, where we were
23 dealing with these claims and sharing information, all of a
24 sudden that door is slammed shut. They had the information.
25 They had it all along.

1 They throw out to you, Your Honor, Toledo, this
2 Toledo order and say, I should have -- I violated some stay.
3 That could not be further from the truth, Your Honor. First of
4 all, there was no automatic stay involved. Secondly, I was
5 defending the bankruptcy court against a district court who
6 didn't like what the bankruptcy court did. Thirdly, the order
7 they cite makes no finding whatsoever as to me. One of my co-
8 counsel wrote a letter and the district judge wouldn't too
9 happy with him. And lastly, Your Honor, the order they cite to
10 you was vacated. They're up here citing an order that was
11 vacated to you as -- which doesn't deal with a bankruptcy stay
12 as supposedly some more mud to sling on me.

13 They sling mud on the judiciary of South Carolina.
14 What's interesting is they sling mud on Judge Hayes who lives
15 200 miles from me and who has statewide jurisdiction of all
16 asbestos cases because he's one of the best judges in the state
17 and the Chief Judge Jean Toal appoints the top judges to deal
18 with this mess and I think Your Honor can understand why you
19 need somebody to deal with this mess. Judge Hayes, who had
20 never appeared before before the Anderson case.

21 Judge Hayes did say to write an order. He told me
22 what to put in it. He changed it around. He was careful with
23 the order itself which is attached. It explicitly states that
24 it does not affect Grace. I was not trying to get around some
25 automatic stay. Judge Hayes was explicit on that.

1 What's interesting is the door closing order, which I
2 don't particularly like, as you might gather, was granted by
3 Judge Howard, Judge Hayes predecessor, and it was drafted by
4 Grace and the other defendants in the same manner. They
5 drafted a letter from Judge Howard, but they don't stand up
6 here and tell you that Judge Howard is somehow -- some
7 backwards southern judge because the order was written or typed
8 by the law firm. In fact, Judge Howard is not from Hampton,
9 he's from Charleston. He's about 75 or 80 miles from where I
10 live.

11 I mean, there's not some vast conspiracy going on in
12 South Carolina. They say, Your Honor, there was an -- this
13 order is ex parte. That's what they say, ex parte
14 certification order. And they know that. All Judge Hayes did
15 was to -- it's like a TRO in a domestic dispute. Judge Hayes
16 had had this case for years and years. The record was closed.
17 He had heard all the evidence. The only thing he was waiting
18 on was a transcript because Grace, in about four to five months
19 of time, because they said we want to file another brief after
20 the transcript's here.

21 There's not one bit of evidence that was put before
22 Judge Hayes after he signed that conditional order in February.
23 But what they know and what they don't tell you is that he
24 said, come and we'll have a hearing to see whether to keep this
25 order in place. And then we had a hearing and Grace's South

1 Carolina counsel and Grace's New York counsel, now federal
2 judge Kevin Castel, Grace's counsel appears in South Carolina
3 and argues vehemently, would not tell the judge whether they
4 were going to file bankruptcy or not, but argues against the
5 entry of the order. And Judge Hayes, at the end of the
6 hearing, said, having heard fully from both of you, I will
7 continue the order.

8 They keep throwing out Celotex. I could talk about
9 Celotex for three days, Your Honor. And I assure you that we
10 have been consistent about what we've said about Celotex.
11 Celotex was a plan of reorganization and this one had the
12 maximum number of votes. Celotex is Anderson claims have been
13 allowed in large part, some have been rejected by the claims
14 administrator in Celotex. The trustees in Celotex, chosen by
15 the bodily injury committee, we were crammed down in Celotex,
16 chosen by them in an action supported by Mr. Insulbuck
17 (phonetic) and Mr. Rice and all -- they had intervened in it,
18 of trying to keep many property damage claims from being paid.

19 New York City and the State of Utah and the State of
20 Illinois, et cetera, et cetera, they're trying to stop the
21 payment because we have a common trough, we have a common fund
22 in Celotex. And they believe that the more money -- the less
23 money that's paid to putative claimants, not just Anderson, but
24 I represent Clemson. I've done more work on Clemson there than
25 I have on Anderson in that bankruptcy. The more money -- or

1 the less money that goes into the payment of PD claims, the
2 more money goes to PI claims. So, yes, there's litigation down
3 there and yes, the trustee's are challenging, and yes, the --
4 excuse me, Your Honor.

5 And yes, Your Honor, two bankruptcy judges, Judge
6 Thomas Baynes who got so infuriated after having the case for
7 12 years and after ruling against the trust and saying pay a
8 lot of these PD claims, it's the claims administrator who
9 decides, recused himself after 10 or 12 years on the case. The
10 case then went to Judge Glenn, Judge Paul Glenn who has now
11 issued orders in every situation, upholding the property damage
12 claims administrator. Anderson just hadn't gotten up yet. It
13 will probably get up very soon.

14 And in addition, Judge Glenn has now been affirmed by
15 the district court in Florida that the trustees did not have
16 the authority to fail or refuse to pay these claims. I mean,
17 Your Honor, I can go on and on.

18 Perhaps the one I should address because I believe
19 this is the fourth or fifth hearing in which, after the claim
20 has been withdrawn, the fourth or fifth hearing that -- and I
21 want a legal hearing to argue about American Reserve and
22 Charter and what the fiduciary responsibilities are. The
23 fourth or fifth hearing -- the AMA comes up again. The claim
24 was withdrawn in early summer. And they use that one as
25 supposedly -- the others they've known about for three or four

1 years, that I filed claims under the Anderson umbrella. But
2 they claim, it's not what the affidavit says, they claim that
3 the AMA -- I was told or more appropriately, I guess, or more
4 accurately, my associate was told not to file the claim. And
5 Your Honor, in July 29, I think that date's right or maybe it
6 was 21st -- maybe July 20th. When I was on that plane to
7 California, you got real upset when somebody told you that
8 somebody told my firm not to file a claim and we did so. And I
9 don't blame you for getting upset. And it did not happen. And
10 I'm prepared to meet that factual assertion.

11 THE COURT: Wait just a second.

12 MR. SPEIGHTS: I've had an affidavit from Ms.
13 Stenmeyer (phonetic) in my bag since we met two hearings ago.
14 But Your Honor also said that claim's been withdrawn. We're in
15 an expungement process and today we're here dealing with facts.
16 And I am assured from my records --

17 THE COURT: You lost me for one second, Mr. Speights.
18 What didn't happen. You never got a phone call from --
19 somebody in your firm never was told by the AMA not to file a
20 claim? What is it that didn't happen?

21 MR. SPEIGHTS: We were not told not to file, I know
22 that's a double negative. From my investigation, I wasn't
23 involved in it. You know, this one -- there's so many slight
24 of hands. Just one of the curiouser ones is if you look at
25 their -- if you look at their fee records and you see Speights

1 & Runyon, it's always S&R. That's the way we've been referred
2 to, like K&E. Well, now, we're not K&E, but we've been
3 referred to as S&R since 1987. But if you go in all the briefs
4 they've filed here, it's always Speights & Runyon, quote,
5 Speights because they know that and I take responsibility for
6 my firm and I'm not backing away from what my people did and I
7 believe what my people did was honoring their duties to this
8 class, but they know that I don't have firsthand knowledge.

9 Once they raised this issue, I have an affidavit from
10 Ms. Stenmeyer and I have the factual investigation into the
11 matter. The claim was always going -- a factual investigation
12 into the matter which convinces me that the American Medical
13 Association did not tell us not to file the claim. There were
14 a number of discussions about the claim. And ultimately, the
15 AMA decided not to go forward with the claim and told Speights
16 & Runyon to withdraw the claim. Now, that's a factual issue.

17 THE COURT: But the question -- but the real -- it is
18 a factual issue. But the real question isn't whether you were
19 told not to file it, it's whether you were told to file it.
20 That's how you get authority. It's expressed authority that's
21 required. You just don't go willy-nilly filing claims on
22 behalf of entities and buildings in any bankruptcy case just
23 because you can.

24 MR. SPEIGHTS: And that brings us to the legal issue,
25 Your Honor. That is the legal issue. Whether we have the

1 legal authority because at the end of the day, while AMA has
2 been expunged and is not before you, there are claims here, and
3 I believe 500 and something claims, which are members of a
4 putative class or certified class. And we believe that we have
5 the authority to file those as a matter of law. And that's
6 what I came to argue today and hopefully I can convince you of
7 that, Your Honor. But I just had to address some of these
8 factual assertions and there are many, many more, if I get the
9 transcript, I can annotate it for you, which try to obfuscate
10 the narrow legal issue before you. Let me step back, if I
11 could, Your Honor, and go --

12 THE COURT: Well, let me ask one factual question
13 first because I want to make sure there isn't a disagreement
14 about this. Whatever the class action was that was certified,
15 it was apparently an in-state class in South Carolina, correct?

16 MR. SPEIGHTS: Yes, ma'am.

17 THE COURT: All right. And it was an opt-out class,
18 is that correct?

19 MR. SPEIGHTS: Yes, ma'am.

20 THE COURT: And notice never went out to the putative
21 class members to provide them the opportunity to do the opt-
22 out?

23 MR. SPEIGHTS: That's correct.

24 THE COURT: So you don't, at this point, know who the
25 class members are because that class, based on whatever it is,

1 hasn't yet been given notice and a chance to decide whether to
2 be in or not to be in?

3 MR. SPEIGHTS: That's correct, Your Honor. And for
4 good reason, as Your Honor I'm sure understands that right
5 after the class was certified, both Mr. Grace in February and
6 as to USG and Mogul and U.S. Mineral in June, all of these
7 people, all of these companies declared bankruptcy in the
8 court. So that --

9 THE COURT: Well, I do understand it. I guess my --
10 what I want to get to is how there is authority as a matter of
11 law to file it when the class itself isn't yet determined.
12 That's where I think the legal issue has to go.

13 MR. SPEIGHTS: And I'm happy to go there, Your Honor,
14 and maybe I shouldn't go back to where I wanted to start, but
15 as Grace wanted to put its spin on things and wanted to place
16 its -- everything in context as it sees the world, I want to
17 take about five minutes and tell you how I see the world and
18 then get down to the nut of the issue.

19 THE COURT: All right.

20 MR. SPEIGHTS: The authority issue. You know, Your
21 Honor, in medicine, and I do mean in medicine, that sounds a
22 strange way to start, there are physicians who treat disease
23 and there are physicians who try to prevent disease. And the
24 same is true with asbestos litigation. There are lawyers who
25 represent people with disease or, sometimes, allegedly with

1 asbestos disease. And there are lawyers and clients who try to
2 prevent asbestos disease.

3 You know, my side of the bar, and I've seen in many
4 transcripts of Mr. Bernick going toe-to-toe with Mr. Baena,
5 talking about property damage claims. But on behalf of my
6 constituency of property damage claimants, and I've represented
7 them since I first sued Grace in July 1982, property damage
8 claimants first of all are building owners, have saved a huge
9 number of lives. They really have.

10 You know, all of the -- not all, but most of the
11 asbestos disease of the past years, and it was a terrible,
12 destructive number of cases of asbestos disease, occurred, for
13 instance, in shipyards, not because, and this is something that
14 the BI fellows don't talk about a whole lot, not because of
15 people applying the material in a wet state often, but because
16 of all the rip-outs which created these monstrous dusty
17 conditions and huge numbers of disease. The same thing
18 occurred with the asbestos insulators, not people who applied
19 it, but before you applied it, you had to rip out the old.

20 And the same thing would have occurred with Grace's
21 material which was essentially, the vast majority sold in the
22 1960s and placed on beams and ceilings throughout America, the
23 same thing would have occurred if we didn't have federal
24 regulations and if we didn't have building owners who spend
25 millions of dollars to safely remove the asbestos from

1 buildings, there would be hundreds of thousands of additional
2 victims of asbestos disease.

3 We are in the prevention business. In addition, we
4 have saved Grace a countless number of lawsuits by preventing
5 those. And it's sort of ironic that we come along trying to
6 get Grace to pay for our saving them money, our saving them all
7 of these asbestos lawsuits and have Grace team up with the
8 bodily injury group, and I believe there is a -- I believe
9 there is something in the winds, I may be wrong, I think
10 they'll come to you very shortly -- team up with the asbestos
11 bodily injury group and say, well, these people who are never
12 sick and never were exposed to Grace's product are entitled to
13 money and the people who save us by safely removing the
14 asbestos are not entitled to a cent.

15 I'm very proud to have represented the property
16 damage claimants since 1982. And I want to tell you why this
17 fits in with Anderson. I won a bunch of cases against Grace,
18 or settled a bunch of cases. Got an \$8 million verdict
19 affirmed by the Fourth Circuit when Grace hired Griffin Bell
20 (phonetic), the former attorney general, to argue in the face
21 of it. I tried the case. Mr. Westbrook (phonetic) argued the
22 appeal. In case he's on the phone, I don't want to take credit
23 for the appeal.

24 And then Grace does something very smart. They hire
25 a whole new team of lawyers, in-house lawyers under Mr. Beber

1 and Mr. Sparks and Mr. Fink and others. And they said, we've
2 got to get hold of this situation. Grace wasn't even on the
3 bodily injury radar screen then. All of the cases and all of
4 the settlements back during that time, almost all, were
5 property damage settlements. But that was the situation and
6 they did some very smart things for their client, W.R. Grace.

7 The first thing they did was they formed an
8 organization known as a Safe Building Alliance. And that is
9 discussed in a Third Circuit Appellate decision which the Safe
10 Building Alliance, massive amounts of money, publicized to all
11 the world misinformation. I would say saying, leave your
12 asbestos in place, don't remove it. Leave it in place, don't
13 remove it until demolition of the building or substantial
14 renovations. Now, Grace was altruistic. Grace did that
15 because it wanted everybody to wait until the statute of
16 limitations run under their view of the statute of limitations.

17 And the second thing they did was they influenced the
18 regulators. Everybody influences regulators. They're walking
19 the halls of EPA and all the other agencies, it seems, in
20 Washington. But they got the EPA to back off and in the early
21 90s, they got the EPA to publish what's called the Green Book.
22 And the Green Book says, unlike earlier versions of what EPA's
23 guidance was, that in many cases, it's better to leave the
24 asbestos in place and wait until demolition of the building.

25 So it's 1992. I just got back from North Dakota

1 trying that NDU case that I've cited to you often on statute of
2 limitations. The worse 12 weeks of my life. Grave got a
3 verdict on the statute of limitations and on liability. The
4 first loss that I had incurred. And I had to face the Green
5 Book in this new defense. And I came back to South Carolina
6 and drafted a complaint of a, we'll call it a National Class
7 Action. Grace is technically correct, that they did not have
8 geographical boundaries. It certainly included Canadian
9 buildings.

10 I came back and drew a complaint. And I was torn
11 whether to file the case in South Carolina or not because I was
12 aware of the door closing statute, the original door closing
13 statute case came from my home county. But then Federal Judge
14 Bloch ruled in the Central Wesleyan College class, that the
15 door closing statute was not an impediment where the named
16 class representative was a South Carolina citizen. So I filed
17 the case in 1992 in South Carolina.

18 Now, that was a big deal, I think, to Grace. And
19 when they tell you, Your Honor, we only have seven cases, what
20 they don't tell is before 1992, the majority of cases filed
21 against Grace, property damage cases, were filed by Speights &
22 Runyon. And we decided to put our eggs in the basket of
23 Anderson class action. And we pursued that litigation for a
24 number of years. It was contentious. It was difficult. We
25 won the venue motion to keep it in Hampton. We lost the door

1 closing motion and we couldn't appeal it. We took discovery
2 all over the country. We had an adversarial evidentiary
3 hearing on certification. We had multiple discussions with
4 Grace. We have out-of-pocket expenses of close to a million
5 dollars. We've got millions of dollars in fees.

6 I'm not saying that decides the legal issue today,
7 but the idea that all of a sudden Mr. Speights or Mr. Speights
8 associate, sometime in March of 2003 was off her rocker when
9 she filed a bunch of claims, she had a lot of -- she had a lot
10 in front of her when she filed those claims that said that she
11 should do it. She had the Celotex order. She had an ethical
12 opinion by a law school professor. And I have that affidavit.
13 I have an affidavit from a law school professor once we get
14 into the facts.

15 She had the court hearing that attended where the
16 judge in that case heard all the evidence and she had -- forgot
17 -- I don't think the order, the later order applies to Grace.
18 I've never said that. The order itself says it doesn't. But
19 she had Judge Hayes saying there was absolutely no basis for
20 the attack that we didn't have authority to file Celotex
21 claims. So she filed those, we filed those, my law firm filed
22 those in good faith.

23 Now, there's something else interesting about this,
24 Your Honor. And -- excuse me, Your Honor. I read the -- in
25 the transcript, Your Honor, which is a 2002 transcript, which

1 was first mentioned in the reply argument. I don't know if
2 they just discovered it or whether they had some reliance on it
3 all along. But the 2002 argument is very interesting for a
4 number of reasons. And I'm going to address them in a few
5 minutes.

6 But among other things, it's Mr. Bernick, when they
7 were arguing about the bar date order, the appropriate bar date
8 order before Your Honor, they suggested that he didn't want a
9 class proof of claim. He argued strenuously against it. And
10 Mr. Bernick wanted people to furnish data. That's what Mr.
11 Bernick's position was. And at the end of the hearing, as I
12 interpret it, and I was there and you were there, but it's been
13 a long time for both of us, you said to Mr. Bernick and Mr.
14 Baena, well, you guys need to work out this bar date order, et
15 cetera, et cetera. And the bar date order goes out and never
16 mentions class claims unlike some other bankruptcies. Mr.
17 Bernick got his way, in my opinion, that the bar date order did
18 not say you must file a request for -- file a class proof of
19 claim, et cetera.

20 More importantly, American Reserve, which I'll get to
21 in a few minutes, does not require you to do that. The law is
22 not that you have to do that as I'll discuss in a few minutes.
23 But in any event, not only did we file these claims based upon
24 everything that we heard in South Carolina, not only based upon
25 ethical advice, but what I think what we actually did was

1 consistent with Mr. Bernick's explanation to the Court in 2002.

2 So let's get to the law. By stipulation, we have
3 agreed to first go forward on purely legal issues. The first
4 two legal issues are whether, as a matter of law, we had
5 authority to file these two claims. That's all before the
6 Court. None of this other stuff is before the Court. If it
7 is, I want discovery.

8 My response is simple and straightforward. The cases
9 we have cited to you say we not only had the right, but the
10 duty to file these class proofs of claim. I believe American
11 Reserve clearly holds that. It has been followed. It's an
12 opinion that is written by two of the most distinguished judges
13 in the United States including Justice -- Judge Posner. It's
14 cited by Mr. Bernick. It's been followed by the Eleventh
15 Circuit in Charter. We cited it repeatedly in the brief. And
16 what the court said in American Reserve is that counsel for a
17 putative class are counsel for the missing.

18 THE COURT: I'm sorry, say again?

19 MR. SPEIGHTS: Counsel for a putative -- does this
20 work?

21 THE COURT: Yes.

22 MR. SPEIGHTS: If I could just place on there. It's
23 the only overhead I have, Your Honor.

24 THE CLERK: I don't think it's turned on.

25 THE COURT: Counsel for the putative classes what?

1 MR. SPEIGHTS: Counsel for the missing.

2 THE COURT: Okay.

3 (Pause)

4 MR. SPEIGHTS: If I could, Your Honor, a Rule 23
5 class action --

6 THE CLERK: Excuse me, sir, you'll need a mic.

7 MR. SPEIGHTS: I'm sorry.

8 THE CLERK: Here's a hand mic if you --

9 MR. SPEIGHTS: Thank you. "A Rule 23 class action is
10 not simply a device by which one plaintiff prosecutes the case
11 after many have separate suits or intervene in a pending suit,
12 it is a device by which the representative is an agent of
13 persons who have not appeared or given even passive consent."

14 MS. BROWDY: Excuse me, could I get a citation to
15 where in the case you are?

16 MR. SPEIGHTS: I've got the WestLaw at page 6. Do
17 you have a WestLaw of -- okay.

18 MS. BROWDY: Thank you.

19 MR. SPEIGHTS: Paragraph that starts 3001(b). And
20 then in the next paragraph is what I was citing to, Your Honor.
21 "The representative in a class action is an agent for the
22 missing. Not every effort to represent a class will succeed.
23 The representative is an agent only if the class is certified.
24 Putative agents keep the case alive pending the decision on
25 certification. If the bankruptcy judge denies a request to

1 certify a class, then each creditor must file an individual
2 proof of claim. The putative agent never obtains 'authorized
3 agent' status. If the court certifies the class, however, the
4 self-appointed agent has become 'authorized' and the original
5 filing is effective for the class of principles. It follows
6 that there may be proofs of claims in bankruptcy."

7 Now that's the leading case followed by all of the
8 circuit courts that have dealt with the issue since then. And
9 that recognizes -- and that in case there's nowhere in that
10 opinion that I can find nor did I even think that anybody would
11 ever suggest before today that you needed to get permission
12 from the court to file the class proofs of claim.

13 THE COURT: But why do I -- I mean, I'm not sure
14 today's the day to argue the class proof of claim issue because
15 I don't think it's scheduled for today. But I do have one
16 concern and that's I already have the individual claims. Why
17 do I need a class claim now. I mean, maybe at some point we
18 can get into those details, but filing a class proof of claim,
19 it would seem would eliminate the need to file the individuals.
20 I understand in at least one case it's been done the other way
21 and there were individual claims filed and then a class
22 certified later, I think primarily for the purpose of dealing
23 with those proofs of claim in a plan context. But, I mean,
24 that's kind of reinventing the wheel, but I'm really not sure
25 that's the issue for today.

1 MR. SPEIGHTS: Well, Your Honor, the reason it's the
2 issue is we did it both ways.

3 THE COURT: But you only -- you haven't filed the
4 request to file a class -- or are you saying you filed the
5 class proof of claim as these 9911 and 9913 claims?

6 MR. SPEIGHTS: We filed a class proof of claim.

7 THE COURT: Okay.

8 MR. SPEIGHTS: And we filed individual proofs of
9 claim of members of the putative class.

10 THE COURT: All right.

11 MR. SPEIGHTS: We did it both ways. And we were sort
12 of in that situation, damn if you do and damn if you don't.
13 The way we did it I think is consistent with what Mr. Bernick
14 wanted. Maybe not, but if you read that transcript, it's
15 consistent with what we were advised. You know, you're sitting
16 in this situation where you were told you have a fiduciary duty
17 and we were told that by the ethics professor. And we did it
18 both ways.

19 I would actually ask the question the opposite of
20 Your Honor. I would say, why did you file the individual ones
21 if you already were filing the class proofs of claims.

22 THE COURT: Well, either, but the reality is we don't
23 need both.

24 MR. SPEIGHTS: And that might be the case. And my
25 solution of this whole problem I think deals with that problem,

1 Your Honor. And I'm skipping over three pages and getting to
2 the heart of the matter. I could discuss all the other cases.

3 What the cases teach and the best one on this is the
4 Charter case which was the next one along which was an Eleventh
5 Circuit case in the face of an objection by the debtors, well,
6 it's untimely now because it's been two or three years down the
7 road. I don't think we're untimely for reasons I can address.

8 And what the Eleventh Circuit said is no, when they
9 file an objection to your claim, that triggered, at that point,
10 your right -- that made it a contested proceeding and gave you
11 the right to file a motion to certify. And that's what
12 happened here. They filed objections in September. We filed a
13 motion to certify the Anderson class within a matter of weeks.
14 We had always -- I say always -- we had researched that and we
15 thought that's what the cases told us. When they object, you
16 file your motion to certify.

17 And in fact, the cases teach us, especially the
18 Charter case, but others as well, that it's good to have this
19 period of time. People can talk. You can try to resolve
20 issues, et cetera, et cetera, just as we were trying to do.
21 But you do not -- you're not untimely if you file it within a
22 reasonable time after they file a motion to object.

23 And my solution is very simple, Your Honor. And I
24 almost was going to stand up here today and give you a 10-
25 minute solution before I had to face that onslaught again. My

1 solution is very simple. We've now filed the motion to
2 certify. What this case, this quote teaches us right here is
3 that we have a -- we are putative agents. We are tentative
4 agents.

5 All Your Honor needs to do is to resolve the motion
6 to certify. If you resolve the motion to certify by saying,
7 Mr. Speights, I'm denying the motion to certify, it evaporates
8 the authority. It's gone. Not because it's some nasty
9 allegation that we did something improperly. Because it's a
10 matter of law. That's what the legal import is. They win on
11 the authority issue for all of these 500 and something claims
12 if you don't certify without any of these factual issues
13 getting involved.

14 And if Your Honor certifies the class action, then we
15 have authority, direct authority under that quote that I just
16 read to you. And all of this other can go away. All Your
17 Honor needs to do -- their response is not due yet -- their
18 response needs to be filed, we need to have a case management
19 order and we'll argue.

20 And why is that not in Grace's interest? Well, the
21 first thing -- you know, I can hear Ms. Browdy from this right
22 ear almost over here, her brain is thinking. Why is it not in
23 Grace's interest. Well, it should be in Grace's interest
24 because I believe it will get rid of this issue in a quick and
25 expeditious manner with very little discovery, et cetera, et

1 cetera. I think it's in Grace's interest because it results in
2 a full hearing on this issue on behalf of absent class members
3 who can never complain again which ever way the Court decides.
4 You certify and they're here. You don't certify, they had
5 their day in court, they had their due process.

6 I mean, I don't know why they might say well, it
7 delays. Mr. Speights is up here shuffling his feet and trying
8 to delay. Well, Your Honor, Grace had two and a half years to
9 object to these claims. And they waited. And they waited
10 because -- I don't criticize them for waiting. In fact, it
11 would have suited me if they had waited another 10 years. But
12 they waited because they were working toward a consensual plan
13 of reorganization. And when that fell apart, they went on the
14 attack. But there is no, as I see it, downside to deciding --
15 to resolve it as we said.

16 Now, Your Honor, I must say this. There's also --
17 I'm not inviting this, but in response to what I expect to
18 hear, there's no downside to Grace because they can make every
19 argument, or almost every argument they want to make in
20 response to the motion to certify.

21 If they want to tell you not to recognize the South
22 Carolina judge's order because it was ex parte or whatever,
23 they can make that argument on the motion to certify. They can
24 ask you not to recognize it. If they want to attack me
25 personally, they can do that in the guise of adequacy of

1 counsel. If they want to argue about the validity of any of
2 these claims, if they want to argue about anything that's been
3 done, they can do it in the context of a certification hearing.

4 Excuse me one minute, Your Honor.

5 (Pause)

6 MR. SPEIGHTS: Your Honor, I don't know actually
7 where -- you know, I've been at this profession a good many
8 years. But I don't know actually where we are and I need to
9 go. I've said my piece on the facts. I don't think there's --
10 I've said my piece on the history. I think I've given you a
11 little context. And I've said my position which is we believe
12 that these cases provided for us putative authority to file
13 these claims.

14 I would be happy to go into detail about what the
15 putative class and what the amended complaint was. I'd be
16 happy to go into detail about the entire history. I'd be happy
17 to go into detail about what Your Honor said during the 2002
18 hearing. There are a number of statements Your Honor made.

19 But at least I think, Your Honor, unless you have
20 questions and if I didn't answer your questions, I want you --
21 I beg Your Honor to ask me again because I'm not trying to
22 avoid your questions. I'm going to sit down and see what they
23 say because it just seems to me that I've never been in a
24 situation where the law was so absolutely clear that we had a
25 right to file class proofs of claims and once they object, to

1 move to certify and Your Honor decides whether to allow to
2 certify or not certify. And we can do that and get rid of all
3 this mess one way or the other.

4 THE COURT: Well, okay. I'm having, I guess, two
5 problems. One is I see a distinction between the possible
6 authority to file a class proof of claim and the authority to
7 file individual claims.

8 As to the class proof, for purposes of this
9 discussion right now, I'm just going to accept the proposition
10 that as a putative class representative, you have authority to
11 file those claims because I don't want to deal with that right
12 now in this context.

13 What I am concerned about is where the authority to
14 file the individual claims is because even if you can act as an
15 agent, even if you have the authority to file putative claims
16 on behalf of a class, filing an individual claim is a much
17 different thing. And those people, whoever the entity for
18 which you're filing that proof of claim, does have to give you
19 authority, does have to either sign or have you sign the proof
20 of claim under penalty of perjury, does have to answer the
21 questionnaire correctly, not with made up information on the
22 spur of the moment.

23 And so that is very troubling to me. I am willing to
24 deal, as I said, right now with the class issues in the context
25 in the motion to certify the class. But that does not, in my

1 view, abrogate the responsibility to deal individually with
2 individual clients in an individual -- on an individual claim
3 basis and make sure that the correct authority is there. And I
4 don't think that the two are necessarily the same.

5 And I'm concerned if there is no authority to file
6 the individual claims as to why they're filed. And I haven't
7 heard anything in your argument that addresses those individual
8 claims. So that's number one.

9 I have another, but in the process of stating that
10 one, I forgotten temporarily what it is. It will come to me.

11 MR. SPEIGHTS: And I appreciate that, Your Honor, and
12 I hope you'll appreciate the predicament we're in when we have
13 a series of cases, the majority view saying you file your
14 putative class action proof of claim. Other cases saying --
15 and the Third Circuit had ruled explicitly on this, other cases
16 going back to Manville and saying you have to file individual
17 proofs of claim. We think we have the authority. We -- and I
18 believe this gets into the facts that we have to deal with and
19 I'd like to be able to show you the facts why we believe we had
20 the fiduciary authority to file those claims because they are
21 members of the class and why we thought we were doing what Mr.
22 Bernick wanted in getting more information.

23 You know, in retrospect now, it's three or four years
24 later, and we can second guess and say, well, if you had the
25 two class claims, we really didn't need to file the individual

1 claims because they were covered by the class. And then we --
2 I believe we would get to this spot. We'd just have two class
3 claims. We arguing if you grant certification, we're home
4 free. We represent those 500 as well as a bunch of others.

5 And if you don't grant certification, then you've got
6 a problem, Your Honor, and this was what Mr. Bernick, I'm sure,
7 was concerned about as well. If you don't, then you've got to
8 go out with, I believe the law would say, with some notice
9 saying you had refused the certified. At least, there's a
10 debate among the cases about what you'd do if you refuse to
11 certify a class.

12 THE COURT: Well, we may -- that issue, however, is
13 clearly taken away by virtue of the fact that we had a bar date
14 for individual property damage claims. There cannot be a
15 person in the country who can argue at this point that that bar
16 date notice doesn't apply.

17 So as to the individual data -- individual claimants,
18 they got notice that they had to file a proof of claim and if
19 they haven't, whether they attempt to be part of a class or
20 not, I think at this point, they're not going to get into a
21 class because they didn't file a proof of claim. Therefore, I
22 don't know how you get into a class when you had a chance to
23 file an individual claim and you didn't. That's why I'm
24 concerned that at this point that may be duplicative.

25 But again, that's not for today. For today the issue

1 is this, some of there individual claimants may have their own
2 counsel. They may decide to file on there own. They are not
3 aware that they were a member of a putative class anywhere
4 because the opt-out notice was never sent. So if they choose
5 to file an individual claim, they've done it. If they don't
6 choose to file an individual claim, I don't see how Speights &
7 Runyon or any other firm can do it for them without that
8 express authority because they don't know anything about the
9 putative class, they haven't been given an opt out.

10 MR. SPEIGHTS: Let me try it this way, Judge. And
11 I'm looking for a solution. We talked about, and I hope I can
12 say this without over-skirting my work product and everything
13 else. We actually talked about why not withdraw the 500 claims
14 outside of South Carolina. South Carolina is a whole different
15 ball of wax, certified class. Why not withdraw those without
16 prejudice similar to what we did on the conspiracy claims, and
17 then argue the motion to certify.

18 Now, we withdrew some claims, I'm glad I reminded
19 myself with that since, we withdrew some claims but it's
20 because these people told us to withdraw. We weren't violating
21 our fiduciary duty. People told us to withdraw like AMA and
22 others, we withdrew them. That's what that's all about.

23 But why not, after this war is declared on us in
24 sometime earlier this year, why not just withdraw those? That
25 would be the easy thing to do. Before September 1, Speights &

1 Runyon could have come and withdrawn those 500 claims and taken
2 the position they were covered by the class proof of claim.

3 THE COURT: You could have withdrawn the 500 in-state
4 claims?

5 MR. SPEIGHTS: No, I'm talking about the out-of-
6 state. The putative class claims.

7 THE COURT: Well, I don't see at this point how those
8 are covered by the putative class claims because they haven't
9 been certified. The only thing that's been certified as I
10 understand it, and please correct me if I'm in error, are the
11 in-state claims.

12 MR. SPEIGHTS: You're absolutely right, Your Honor.
13 And that's a distinction. What I'm saying to Your Honor is
14 that we didn't just consider in passing. We considered whether
15 we should withdraw the 500 putative class claims --

16 THE COURT: In-state or out-of-state?

17 MR. SPEIGHTS: Out-of-state.

18 THE COURT: Okay.

19 MR. SPEIGHTS: We considered that and then just argue
20 the motion to certify the class claims when that arises. And
21 if we win that, we have those 500. And if we lose that, we
22 never had those 500.

23 THE COURT: Oh, I see. You'd argue a motion to
24 certify the out-of-state claims as a putative class.

25 MR. SPEIGHTS: That's right.

1 THE COURT: Okay.

2 MR. SPEIGHTS: And we could have done that. And it
3 might have been the safer avenue to take for Speights & Runyon.
4 But we were concerned, rightfully or wrongfully, we were
5 concerned with our fiduciary duties if we all of a sudden
6 withdrew these 500 claims without at least getting some
7 direction from the Court.

8 THE COURT: Well, but if there's no authority to file
9 them in the first place because they're not part of the
10 Anderson putative class, then I don't understand where this
11 fiduciary duty concept if coming from as to those individuals.

12 MR. SPEIGHTS: They are part of the putative class in
13 our view. They are part of the putative class, they are
14 building owners with Grace's product who are within the
15 definition of the putative class --

16 THE COURT: But you've told -- you've been told by
17 the South Carolina courts that that's not the case.

18 MR. SPEIGHTS: Well, actually --

19 THE COURT: There is no putative class certified
20 under the -- I'm looking at Anderson -- under the Anderson line
21 of case.

22 MR. SPEIGHTS: That's not correct, Your Honor, and I
23 should have addressed that and I thank you for asking me these
24 questions as I want to clarify this.

25 All that was involved in the Anderson, we'll call it

1 nationwide, they moved to strike those allegations from the
2 complaint which the court did under the door closing statute.
3 There was never a motion to certify despite what was said
4 today.

5 THE COURT: All right.

6 MR. SPEIGHTS: They were struck from the complaint.
7 We wanted to appeal. We could not appeal because it was
8 interlocutory. In the final order, which I don't rely on for
9 Grace, the judge specifically says that we reserve our right to
10 appeal whether the certification should be broadened to include
11 the nationwide class. There was a split of authority in South
12 Carolina on that issue. Judge Howard, who decided against us,
13 Judge Buckner, another circuit court judge, decided in the Bell
14 case for us. The Central Wesleyan case, Judge Bloch, and the
15 Central Wesleyan appeal in the Fourth Circuit were all on the
16 outside.

17 So we had that issue to go to the Supreme Court. Now
18 we now know with perfect hindsight what the Supreme Court would
19 have done. I not only was on the brief, I argued the case in
20 the Supreme Court. We now know, not for the reasons Judge
21 Howard said, but for other reasons, that the South Carolina
22 Supreme Court said the door closing statute says that a state
23 circuit court cannot entertain these claims for out-of-state
24 people. But a federal court can. That decision came out after
25 the bar order, after the bar order, at the time we were filing

1 claims. Excuse me, after the bar date.

2 THE COURT: But the point for my purposes is, I
3 think, the question of the fiduciary duty. As I understood
4 what you told me, I think, in August, you have an opinion from
5 a law professor that says that because there was a
6 certification by the state court in South Carolina of a class,
7 that you have an obligation to file something here on behalf of
8 that class. And so you did. But the problem is that that
9 certification doesn't include the out-of-state claims.

10 MR. SPEIGHTS: Your Honor, if I said that, that's not
11 what I meant to say. What happened was and what the facts are
12 and what I have an affidavit to show you if we have to get to
13 this, you know, is that the law professor said that we have the
14 obligation to file claims on behalf of putative class members
15 because we had filed that class action on them, on their
16 behalf, and that class action was still alive because we had
17 not had the appeal. That was also the precise issue which
18 Grace raised in South Carolina.

19 THE COURT: But it's been decided since. When did
20 this -- did the decision that said that the door closing
21 statute would prohibit the state court in South Carolina from
22 hearing the out-of-state claims come down before or after the
23 proof of claim was filed here?

24 MR. SPEIGHTS: After.

25 THE COURT: All right. So you filed it based on the

1 fact that the appeal hadn't yet been decided that now you know
2 that the state court in South Carolina is not going to certify
3 that class because the state -- the Supreme Court said it
4 can't.

5 MR. SPEIGHTS: I think I would be hard pressed to try
6 to convince the Supreme Court on appeal to do something
7 differently than it did in the other case I had up there.

8 But, Your Honor, there are a couple things about
9 that. I want to go back to the fiduciary and then come back to
10 that. What the hearing was about in South Carolina was we did
11 the same thing in Celotex. We filed for members of the
12 putative class in Celotex why we couldn't appeal that ruling,
13 okay. And Grace took the position that we were inadequate
14 counsel, big-time experts testifying now, we were inadequate
15 counsel because we shouldn't have done that. And we call
16 experts and the court decided in it implicit and the
17 conditional certification that there was no basis to that
18 adequacy attack on that ground.

19 Then, before we filed claims in Grace, the South
20 Carolina Supreme Court still hadn't ruled, before we filed
21 claims in Grace, we again consulted with that ethics professor
22 who told us we had a fiduciary obligation to file claims on
23 behalf of putative class members, to pursue it.

24 Now, to your direct question, you said, well, you
25 know, we now know that the South Carolina Supreme Court would

1 not allow you, Mr. Speights, to proceed with the nationwide
2 class action. Well, if Grace had never filed bankruptcy, and I
3 wish they had not as I'm sure many of Grace's employees wish
4 that, if Grace had never filed bankruptcy all I would have --
5 could have done was to take my case, okay, once the South
6 Carolina Supreme Court ruled in April of 2003, down to
7 Beaufort, South Carolina, 39 miles from Hampton, and file the
8 complaint in federal court.

9 I could proceed with the putative class. I could
10 proceed with it because the South Carolina Supreme Court said
11 it only applies to state court and because the Fourth Circuit
12 Court of Appeals had said that the door closing statute does
13 not bar the same type of litigation when the colleges file --

14 THE COURT: Okay. Well --

15 MR. SPEIGHTS: And I could file it here. There is no
16 -- the door closing statute does not preclude Your Honor, and
17 if we ever get to the motion to certify, we'll brief it, does
18 not preclude Your Honor from deciding as a federal bankruptcy
19 judge whether to certify or not certify this class action.

20 THE COURT: Okay. Well, I guess the only difficulty
21 I have at this point is the fact that we have individual claims
22 that have been filed. And I am still concerned, you know,
23 there -- as I said, there may be some basis once the individual
24 claims are known and fixed, that is who can file them, to put
25 them into assorted classes, perhaps, for disposition. Maybe

1 that makes some sense.

2 But it doesn't make any sense to me at this point
3 that I have individual claims filed unless there is expressed
4 authority from those claimants to file those individual claims.
5 Now, again, I'm excluding the in-state South Carolina
6 plaintiffs from this discussion at the moment because that's
7 really not what I want to focus on at the moment. But I do not
8 see how there is authority either because there was a putative
9 class that could have been filed in another court, but wasn't
10 yet. Or because of any other theory where you can file an
11 individual proof of claim for someone without the authority of
12 that entity to do it.

13 MR. SPEIGHTS: Your Honor, I disagree with you, but I
14 believe there is a solution here that's so simple that we can
15 all have our lives made much easier.

16 What I was saying to you and where I was trying to go
17 is that we believe we had to do this -- we did have a putative
18 class action. South Carolina had not ruled when we did all
19 this. And we thought we had a fiduciary responsibility to file
20 these individuals buildings. Your Honor --

21 THE COURT: But then likely -- excuse me one second.
22 But if there's a fiduciary duty to file them when there is
23 potentially a putative class, there's also a fiduciary duty to
24 withdraw them when there isn't a putative class.

25 MR. SPEIGHTS: But Your Honor, that's not the

1 situation.

2 THE COURT: But it is.

3 MR. SPEIGHTS: There was not the potential of a
4 putative class, we had a putative class.

5 THE COURT: But it was not certified.

6 MR. SPEIGHTS: It was not certified, it was a
7 putative class.

8 THE COURT: But it -- once it's certified, it's not a
9 putative class anymore. It's no class. It's only putative
10 while it's pending, until the motion to certify is decided.
11 After that, it's either a class or it's not a class.

12 MR. SPEIGHTS: I understand, but we were in this
13 purgatory with respect to the nationwide buildings.

14 THE COURT: Yes, until the Supreme Court ruled. I
15 agree.

16 MR. SPEIGHTS: I don't believe the Supreme Court
17 ruled -- by the time the Supreme Court ruled, we couldn't do
18 anything about it because we were in federal court. We were
19 not no longer in a state court.

20 THE COURT: Wait, you're in bankruptcy court?

21 MR. SPEIGHTS: I'm in federal bankruptcy court.

22 THE COURT: Right. Okay. You filed the proof of
23 claim on a class basis for the out-of-state plaintiffs alleging
24 that the authority is the Anderson case in South Carolina. The
25 Anderson case goes up on appeal and the South Carolina Supreme

1 Court says there is no authority under the door closing statute
2 to --

3 MR. SPEIGHTS: That's not correct, Your Honor.

4 THE COURT: No. Okay. Then straighten me out.

5 MR. SPEIGHTS: We filed the case in South Carolina
6 nationwide. The trial judge, on a pleadings issue, says you
7 can't go forward nationwide. You cannot appeal that now.

8 Grace took the position we could not appeal.

9 THE COURT: Right. But you had --

10 MR. SPEIGHTS: That -- the status -- that was the
11 status when we filed all these claims.

12 THE COURT: Yes. But then the case was decided by
13 the Supreme Court.

14 MR. SPEIGHTS: Another case.

15 THE COURT: Another case. Okay. Was decided by the
16 Supreme Court that says that in virtually identical
17 circumstances, the state court cannot take cognizance of out-
18 of-state plaintiffs for this class action.

19 MR. SPEIGHTS: Right.

20 THE COURT: Now, okay. And I think you just said
21 you're going to be very hard pressed to get the State's Supreme
22 Court to back off that opinion in Anderson because it just
23 decided it in a similar case.

24 MR. SPEIGHTS: If I was in South Carolina, I would
25 try and head to federal court.

1 THE COURT: Exactly. But then the -- but Grace files
2 bankruptcy. So you can't head to federal court.

3 MR. SPEIGHTS: Well, no, Grace filed -- they had
4 filed bankruptcy years before. The bar date's expired. This
5 happened in 2003 when the Supreme Court rules. I'm no longer
6 in South Carolina. I'm in Delaware.

7 THE COURT: That's what I was trying to say. You
8 don't have the option of taking what would have been the out-
9 of-state class in the Anderson state court in the federal court
10 in South Carolina as to Grace. You can't do that anymore
11 because now you're in Delaware bankruptcy court based on
12 Grace's bankruptcy. So the only putative class that could have
13 existed at the time was the state court class. And it's now
14 clear that state court class can exist. And therefore it's not
15 a putative class anymore.

16 MR. SPEIGHTS: And that's where I take a separate
17 road from you, Your Honor. And now we're getting into a
18 bankruptcy issue and as you know, I'm not a bankruptcy lawyer,
19 but in my opinion is from what my little knowledge is that once
20 Grace filed its bankruptcy, we freeze the situation here. Yes,
21 we now know what happened in 2003 in South Carolina, but we
22 cannot use that order against us anymore than I can use a June
23 order certifying South Carolina for us.

24 THE COURT: That order wasn't entered in the Anderson
25 case.

1 MR. SPEIGHTS: I understand it, but had it -- what
2 that order tells us is, if I was still in South Carolina, I
3 would lose my appeal. It doesn't say I've lost my appeal. It
4 doesn't dismiss my complaint.

5 THE COURT: Right. That's right.

6 MR. SPEIGHTS: It doesn't do any of that, okay. And
7 what it now says because I'm before you, I can file a motion to
8 certify. It's still a putative class action. The fact that we
9 know, we have a crystal ball that's 100 percent accurate here.
10 The fact that we know we would lose if we went on appeal in
11 South Carolina doesn't mean we have win on our appeal or that
12 there's any judgment on that issue. We still have a putative
13 class. The fact that an order was entered later on does not
14 terminate the putative class.

15 But I've got a solution I really want to get out. I
16 mean --

17 THE COURT: Right. Go ahead. I promise not to
18 interrupt you.

19 MR. SPEIGHTS: No, no, I mean, I'm glad I could put
20 down an outline and all these cases and all these facts and get
21 to the nut of the matter. I really am. I wanted to know what
22 it was that Your Honor was concerned about.

23 We could spend hours discussing this and to the
24 extent there are factual issues, we'd want discovery. But my
25 point is very simple. The 500 out-of-state complainants will

1 rise or fall with the motion to certify. And what my first
2 alternative is and the one I think is legally correct, but it's
3 also what I much prefer is that you sit on these 500 objections
4 and that you decide the certification.

5 Okay. And if you decide the certification, we have
6 it. They're going to be part of the class. And if you decide
7 against us on certification, how -- pursuant to the case, our
8 authority, our authorization evaporates.

9 But I have a backup solution as well. And I don't
10 quite know how to do it. And I probably need to converse some
11 with my co-counsel here. But the backup is that we could --
12 there's been a change today. There's been a change today
13 because Your Honor now has told us, during this hearing, what
14 your views are. I have fulfilled my fiduciary obligations, I
15 believe, subject to talking to Mr. Fairey a little bit. I have
16 fulfilled my fiduciary obligations by coming and explaining to
17 you why I filed these 500 claims. And I can make a record on
18 that with all the affidavits and everything.

19 But if at the end of the day you're telling me you
20 don't think that's the way I proceeded, I can say that I've
21 gotten the guidance now from the Court that that's not the way
22 we proceeded and withdraw those claims without prejudice to
23 their rights in the event that Your Honor certifies a putative
24 class action. It can go away that way.

25 I couldn't do that before. When we talked about it

1 and all in September, somebody suggested in fact, Dan, just
2 save your hide and get rid of those. You know, that's a tough
3 job for a lawyer. You know, you're damn if you do and you're
4 damn if you don't. Well, my view was, and I may be wrong, I
5 would be criticized because I've got a law school professor
6 saying I have ethical obligation to represent those people with
7 whom have not given me a written authority.

18 THE COURT: Okay. Thank you. Ms. Browdy.

19 MS. BROWDY: Thank you, Your Honor. Your Honor's
20 heard a lot this morning. I just want to address three issues.
21 First I want to address the individual proofs of claims that
22 were submitted. Second, I'm going to address the class proofs
23 of claim that were submitted. And third, I want to address the
24 latest motion for class certification.

25 Let's start out first with the individual proofs of

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1 claims. We're somewhat dancing around the issues here, Your
2 Honor, on those individual, hundreds and hundreds of individual
3 proofs of claim that Mr. Speights signed and submitted without
4 authorization. But the bottom line, Your Honor, is that those
5 proofs of claims were fraud. Mr. Speights had no authority to
6 submit those. Speights has admitted he had no expressed
7 authority to submit those. Those proof of claim forms that
8 were approved by this Court requires a signature under penalty
9 of perjury that the statements in it are true, accurate and not
10 misleading. And again, we know that the Speights & Runyon firm
11 has now admitted that they submitted those claims without
12 expressed authorization.

13 And you saw from the examples that in part because
14 they had no expressed authority to do it, they had to make up
15 the information in those. Those proofs of claims were
16 fraudulent. And not only that, Your Honor, it took the debtors
17 years to discover that because Speights didn't just come in
18 here with a class proof of claim form and said, let's litigate
19 the issue. Instead these hundreds of claims were buried in the
20 thousands and thousands of claims that Speights filed. We had
21 to take discovery. We had to come to this Court. We had to
22 get orders to even confirm what was in those claims. Those
23 were absolutely, again, fraudulent. There is no case law that
24 says you have the right to go and make up the information and
25 submit individual claim forms.

1 So let's put again the class certification aside for
2 those individual claim forms themselves. Of course Speights
3 had no authority. He's admitted those. They should all be
4 disallowed and expunged. And we should get fees and costs for
5 the effort of having had to go back and discovery those, this
6 information. And that's true not only for the out-of-state
7 claims, but for the in-state claims because all of the hundreds
8 of claims identified on Exhibit 1 and 2 of our opening brief,
9 Speights has admitted in compliance with this Court's order of
10 September 23rd that he had no express authority to sign and
11 submit those claim forms.

12 Second, moving on to the class proofs of claim, this
13 issue was addressed almost four years ago in 2002 when the
14 Court took up the issue of whether there'd be notice, whether
15 there would be a bar date, what the claim form would look like.
16 The issues were sorted out. The debtor spent millions of
17 dollars at the Court's direction on a notice program. And
18 there were no class proof of claim issues raised. We showed
19 the Court the excerpts from the February 25th, 2002 hearing
20 that if this was going to be addressed, that was the time to do
21 it. Would we have opposed it at that time? Absolutely. Just
22 like we oppose it now. But that was the time to do it before
23 millions of hours were spent on the notice program. Speights
24 had no authority to file class proof of claim forms, either
25 Form 9911 or 9914.

1 And we know it because the Court said so in 2002.
2 And not only that, Your Honor, as we, again, keep dancing
3 around the issue, let's start out with the out-of-state claims.
4 There was no state court ever certifying that court -- that
5 out-of-state claim. The South Carolina Supreme Court struck
6 the claims for out-of-state buildings. There's no South
7 Carolina federal court that's even been asked to address the
8 issue. There is no South Carolina federal court order that
9 gives Speights authority to file an out-of-state claim.
10 Speights didn't come to this Court and seek permission under
11 American Reserve. Speights had no authority from the
12 claimants. There is no putative class.

13 Essentially, what Speights is saying is because I
14 could make these claims in a 1992 complaint that's been
15 rejected and has been superceded in South Carolina, that I now
16 have authority to go forward on the out-of-state basis. There
17 was no authority.

18 THE COURT: Well, that -- you know, that's the
19 problem, I guess, I have with the concept of the putative
20 class. I mean, basically, any creative lawyer can come up with
21 a putative class for anything.

22 MS. BROWDY: Absolutely.

23 THE COURT: And therefore try to submit a class proof
24 of claim. I can agree that if a class action has been filed
25 somewhere and it hasn't been determined whether there is or

1 isn't a class yet by virtue of the certification, that there is
2 a putative class because somebody has filed a pleading, put
3 essentially their own reputation or their clients integrity on
4 the line saying that there is such a putative class.

5 But the problem I have with the out-of-state
6 claimants here is that it seems very clear that at this point
7 in time the South Carolina state courts could not take
8 cognizance of the out-of-state building claims under the
9 authority of the South Carolina Supreme Court. Maybe it could
10 be refiled as a federal action, but it hasn't been. So at the
11 moment, I don't see how there is a putative class for out-of-
12 state claims because the one's been rejected and the other
13 hasn't been filed.

14 MS. BROWDY: Absolutely. There is no out-of -- this
15 is a fabrication.

16 THE COURT: Now, what I don't know, and I think this
17 is what Mr. Speights is getting to, is what happens if you file
18 that putative class as a proof of claim in a bankruptcy court.
19 Now had it been -- had it never been filed anywhere else as a
20 putative class, then I think the bankruptcy court has to take a
21 look at the federal standards and determine whether or not you
22 can or can't certify that class. But his one has been
23 rejected, at least under the state law in which the suit was
24 filed and not -- as I understand Mr. Speights, not in this
25 specific case. The allegations were stricken against the out-

1 of-state claimants in that class.

2 So, there is no putative class anywhere except for
3 this potential class proof of claim filed here. But I don't
4 see how you have a fiduciary obligation to file that here when
5 the state court has rejected it and the individual claims have
6 already been filed. So the individual claims have either been
7 filed by people with claims, who've given authority, or not.

8 I just don't see the basis as to the out-of-state
9 claims for class certification. This is pretty much a gut
10 instinct. I have -- obviously, I haven't had the benefit of
11 all of your briefing yet, but I'm having a great deal of
12 difficulty understanding that theory given the context of this
13 case.

14 MS. BROWDY: Your Honor, again, the Court's exactly
15 right. There is no class for out-of-state claimants. This is
16 a fabrication just like the hundreds of proof of claim forms
17 for individuals were a fabrication.

18 And Your Honor, let's talk about the class proof of
19 claim for either for in-state or out-of-state claims. American
20 Reserve and the other cases that have said, and not every court
21 has, but those courts that say that a bankruptcy court can
22 recognize a class action could not be more plain. You've got
23 to come to the bankruptcy court and get permission from the
24 bankruptcy court to do it. And that's what this Court
25 recognized in February of 2002.

1 And I would urge Your Honor to look at, for example,
2 the Ephedra decision that's cited in our reply paper. And also
3 the Zenith opinion because those make clear, it not only leaves
4 it in the discretion of the bankruptcy court, but even if there
5 was a class certified in the state court, the issues are
6 different, and the decision-making is different in the
7 bankruptcy court.

8 So even if there were a state court, which we'll get
9 to in a moment, but even if there were a state court action
10 certified, which there hasn't been here, this Court would still
11 have the opportunity to review and make the decisions in its
12 discretion as to whether or not something should go forward in
13 this court.

14 I think it's funny, Your Honor, this is about the
15 second or third time we've heard about this mysterious
16 affidavit from some South Carolina law professor. Why hasn't
17 it been given to us? Why hasn't it been given to this Court.

18 THE COURT: Well, because at the moment, this isn't
19 an issue on factual allegations. It's supposed to be an
20 argument as a matter of law. That's my understanding.

21 MS. BROWDY: Well, as a matter of law, Your Honor,
22 under American Reserve and the cases that would follow it, if
23 you wanted to have a class to go forward in the bankruptcy,
24 you'd have to come forward and seek permission from the
25 bankruptcy. And Speights didn't do it. And he didn't do it

1 for the individual claim forms which were improperly submitted.
2 And for the class proof of claim forms for both the out-of-
3 state claimants and the in-state claimants. He submitted those
4 in direct violation of this Court's direction in February of
5 2002.

6 And with that, I'll move on to this third issue which
7 is this new proposal, gee, we can make this all better by
8 addressing anew this motion for class certification. I put up
9 again on the overhead the bar chart of the claims. It has
10 taken us years to sort through, get our arms around what are in
11 these claims. We're now finally starting to make some
12 progress. You'll see, we've gotten rid, in the last couple of
13 months, half of the property damage claims that were submitted.

14 And now Speights is saying, let's open it all up
15 again and so now we'll do a motion for class certification.
16 And now, that might include not only these 500 buildings in
17 Anderson, but even more. I mean, now is the time when we're
18 close to the finish line, in this Chapter 11 we have a case
19 management order in place on estimation and on objections.
20 We're hoping to be finish with this in now less than a year.
21 And now he first wants to open up the door through a motion for
22 class certifications on issues that were addressed four years
23 ago by this Court.

24 The Court has addressed the issues. They address the
25 issues in the context of the notice and the bar date. The

1 Court made a decision. We spent millions of dollars on a
2 notice program. Individual claimants around the country have
3 had the opportunity to step forward. Many of them have. These
4 claims are completely improper. The individual claims should
5 be stricken. The proposed class proof of claims should be
6 stricken. And we shouldn't waste the time of the Court and the
7 money of the estate further briefing this issue on class
8 certification with stay on four years old.

9 THE COURT: Okay. Well, with respect to the out-of-
10 state claims, to the extent that there is no specific authority
11 to file those claims, I think Mr. Speights wants a recess for a
12 few minutes. I'm going to give him that recess. And that is
13 also true with the class proof of claim for the out-of-state
14 claims.

15 As to the in-state claims, I still have some concern
16 how you file an individual claim without the expressed
17 authority of a client. I just don't know how you can do that.
18 I do understand filing the class proof of claim on behalf of
19 the in-state South Carolina entities because there is a
20 putative -- not a putative, there is a class that's been
21 certified with respect to that entity.

22 MS. BROWDY: Not as to Grace.

23 THE COURT: I'm sorry?

24 MS. BROWDY: Not as to Grace. The final order
25 certifying the class is ultra vires. Mr. Speights is --

1 THE COURT: Well, the final order is, but there was a
2 conditional certification order surely for filing a class proof
3 of claim representing somebody. That has to be enough to at
4 least let you file the proof of claim.

5 MS. BROWDY: Your Honor, I urge the Court to read the
6 submission by the Speights firm that led to that conditional
7 order because it's basically saying you're going to lose
8 jurisdiction. The automatic stay is going to go into effect --

9 THE COURT: Well, I understand that, but, you know,
10 any state court worth its salt faced with the prospect of its
11 going to lose jurisdiction because a bankruptcy's going to be
12 filed is going to take the action that it feels is required to
13 be taken based on the litigation that it's heard before that
14 takes affect. I'm certainly not going to be critical for a
15 state court judge for entering an order that it feels is
16 appropriate especially knowing that a bankruptcy may be filed.

17 MS. BROWDY: But that's exactly why, Your Honor,
18 under American Reserve and the cases that follow is that the
19 decision of the state court judge is not binding on the federal
20 court. The bankruptcy court --

21 THE COURT: Well, I understand, but the only issue
22 for today is whether or not there was some basis for filing
23 that class proof of claim. That's all I need to decide today.
24 Not whether the class is appropriate. Not whether each
25 individual who's filed a claim here belongs in the class. Not

1 whether it can be opened up to people who haven't filed claims.
2 None of those issues are here.

3 The only question is, is there at least some
4 colorable basis upon which the Speights & Runyon firm would
5 conclude that it had an obligation to file that class proof of
6 claim. And frankly, I can see that one. I can understand why
7 a law professor looking at it would say, yes, you know, you've
8 taken it this far. You can't drop the ball now.

9 But I can't understand that opinion with respect to
10 the out-of-state claims that were not certified as to anybody
11 including Grace in the state court and where state court law at
12 this point in time would say the state court won't take
13 cognizance of it.

14 MS. BROWDY: So, by Your Honor's comments, it
15 suggests that we're leaning towards a recess, but what should
16 end up getting stricken, again, depending on what happens when
17 we come back, is the individual claims submitted for out-of-
18 state claimants, the class --

19 THE COURT: As to which there's no authority.

20 MS. BROWDY: Which, by definition, is all of them
21 because it was under this September 23rd order this Court said
22 tell me what -- the ones that are filed solely under Anderson
23 Memorial. That's the definition of all these claims.

24 THE COURT: Okay. I just want to make it clear that
25 if a particular claimant is a client of the Speights & Runyon

1 firm and said, file that claim for me, I consider that to be
2 authority.

3 MS. BROWDY: Your Honor, and that, again, is exactly
4 what was sorted out in the September 23rd order.

5 THE COURT: All right.

6 MS. BROWDY: And then the class proof of claim for
7 out-of-state claimants, again, we're going to have a recess,
8 but that was inappropriate. And the individual claims for in-
9 state claimants, again, who Speights didn't represent. You're
10 considering now only the class proof of claim as to South
11 Carolina claimants.

12 THE COURT: Yes. I'm accepting that the two of you
13 have stipulated that for any claim that's filed listing only
14 Anderson as the authority that there was no other expressed
15 authority from an individual -- to file an individual claim.
16 With that caveat, that's what I'm considering. So why don't we
17 take a recess.

18 MS. BROWDY: Thank you, Your Honor.

19 THE COURT: Mr. Speights, how much time would you
20 like?

21 MR. SPEIGHTS: Fifteen minutes, Your Honor.

22 THE COURT: All right. We'll be in recess for 15
23 minutes.

24 (Recess)

25 THE COURT: Mr. Speights.

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1 MR. SPEIGHTS: Thank you, Your Honor. Thank you for
2 allowing me to confer, too, with the man who studies the cases.
3 I don't think I'm going to say anything new, but hopefully I
4 can, in about two minutes, very concisely state what my view is
5 of where we are.

6 THE CLERK: Could you move that mic a little closer?
7 Thank you.

8 MR. SPEIGHTS: Have you got what I said so far?
9 First of all, Your Honor, I understand that we will be going
10 forward on our motion to certify. We file it and they'll file
11 a response. We may do it a bit quickly. There may be
12 discovery or whatever, but we're going forward on our motion to
13 certify.

14 MS. BROWDY: Your Honor, if I may clarify, that's
15 just in South Carolina.

16 THE COURT: Well, I'm not sure yet what's happening.
17 Let me find out.

18 MR. SPEIGHTS: Well, I don't accept that unfriendly
19 amendment. I -- my understanding is that we're dealing with
20 these individual claims. I understand your reservations about
21 the national class action. I didn't just get off the turnip
22 truck. I know where Your Honor's concerns are. But we'll file
23 this motion to certify and we want to go forward with it. They
24 will respond and maybe Your Honor will take something from
25 today and deal with it quickly or maybe we'll convince you that

1 there need to be other things, et cetera. But we still
2 strongly believe, as I'll get into, that we have a fiduciary
3 duty to the actual and putative class actions. And we want to
4 fulfill our duties on the motion to certify.

5 And that leads me to my next point that first of all,
6 I found it interesting Your Honor said something that I had
7 come across late last night in a decision cited in 2002. You
8 indicated that there may not have to be a putative class to
9 file a putative class. And I think that was interregional
10 which was discussed in 2002 with the judge from New Jersey
11 whose name I never know how to pronounce. And I do think that
12 it's correct. I do think we had a right to file a putative
13 class without having a putative class already.

14 But the major point I want to make was I am convinced
15 that there was a putative class when we filed all of these
16 claims. Regardless of what happened later, I also think we had
17 one later, but when we filed these claims based upon the
18 putative class action, all the court had done, and this is my
19 third point, was to say the South Carolina door closing statute
20 does not allow me to entertain a class action for buildings
21 outside of South Carolina. The court there never got into
22 certification issues. There was no motion to certify filed.

23 And never -- the court never expressed a view on the
24 merits or on the substance of whether there should or should
25 not be a class action. Indeed, you know, I don't know what

1 that court would have done had it viewed, Judge Howard at that
2 point, viewed that it did -- that the door closing statute was
3 not an impediment.

4 So that there was a class action. The trial judge
5 did not think he could proceed to -- there was a putative class
6 action and he could not consider certification because of the
7 door closing and, of course, there was a split of authority on
8 that with the majority being on my side, I might add.
9 Unfortunately, like the trial judge in this case, the majority
10 of the cases were on my side until after we filed all the
11 claims and the Supreme Court ruled.

12 Now, Your Honor, given that, and for reasons we've
13 already explained, and for reasons that we could make a record
14 on if facts were important -- I don't think they are important
15 by the way at this point, it's just a legal issue -- given
16 that, we took what we considered the prudent course and filed
17 both ways.

18 I understand what Your Honor is saying, among other
19 things, I don't mean this is all Your Honor is saying, is that,
20 in effect, these claims are duplicative anyway if they're in
21 the class. If you have a class, they're in there. And if you
22 don't have a class, they're not in there. And that's why I
23 keep arguing all of these cases to say if we don't have a
24 class, we have no problem because they all go away.

25 And I continue to urge that decide the class issue

1 and all of these objections resolve themselves. Not only to
2 this, Your Honor, but probably other objections will get
3 resolved by the issue of class, whether there is or is not a
4 class. I'm sure they're attacking other claims under the
5 Anderson umbrella beside those where our only -- where our sole
6 authority is this.

7 So I continue to believe, Your Honor, respectfully,
8 that, you know, we had tentative authority. We didn't even
9 have to have a class action and we tried to cover our bases
10 both ways as Mr. Bernick suggested, et cetera, et cetera, et
11 cetera.

12 However, Your Honor, if you are of the view after
13 reflecting on it, or you come to the view if you take it under
14 advisement that these claims should not go forward, as I said
15 earlier, I've fulfilled my fiduciary obligation now. And I'm
16 happy to withdraw those claims.

17 I'm also understand that as a matter of law, if you
18 decide to strike the claims, if you prefer to strike them as a
19 matter of law, again, facts are not here today, as opposed to
20 my withdrawing them, and you know that, the claims go away
21 subject to whatever do -- they should be without prejudice to
22 those people if, by chance, you certify a class action and
23 somehow they are within the four corners of the class action.

24 That deals with the nationwide class. So we think we
25 have a putative class. We think we did what the cases say. We

1 think we did what Mr. Bernick said. If Your Honor disagrees,
2 we'll withdraw them. We've got the advice. Or if Your Honor
3 wants to strike them as a matter of law, we understand that.

4 Now, the state class, everybody understands, is
5 different. Again, on the state class, we can deal with it in
6 the certification phase and decide which way to do it because
7 as Your Honor pointed out, there's no notices gone out yet. I
8 truly believe there are more claims in the state class than the
9 50 or whatever that are in there now that we've been able to
10 identify from Grace's records as where Grace's product went.

11 Unfortunately, many of Grace's records show that the
12 product was shipped to supply houses or to contractors and this
13 sort of thing. So there's a lot more Grace stuff in South
14 Carolina. And we were proceeding in South Carolina as a class,
15 not -- you know, we weren't to have individual clients in South
16 Carolina to litigate. We'd done that for years. We were
17 trying to proceed as a class. And so we think it would be
18 inappropriate, at least at this time, to withdraw or strike
19 those absent class members at least before you hear the
20 certification issues and decide where we're going with all of
21 this. So --

22 THE COURT: All right. Well, the issue that I have
23 -- as I said, and I'm happy with respect to the in-state claims
24 to go forward with this issue on the class certification
25 motion. But the issue that I have is I don't see how at this

1 point we're going to get more claims into a class than have
2 already been filed when the bar date notice has gone out.

3 So I really think with respect to the in-state
4 claims, and I don't know how many there are in that category, I
5 think we're going to be looking at the traditional class action
6 issues. You know, is there sufficient numerosity and whatever
7 else that will require this to be done on a class bases. And
8 if so, then we should do it. And if not, they're going to be a
9 class anyway for purposes -- all property damage claims, I
10 guess, would be a class for purposes of the Bankruptcy Code
11 voting and classification standards anyhow. But that will be
12 something I'm interested in finding out at the class
13 certification hearing. So as to the in-state, you know, I
14 suppose I'm not opposed to withdrawing that issue on the class
15 proof of claim that was filed.

16 As to the individual in-state claims, though, I still
17 do not see how they're proper because -- and I think you've
18 articulated the reason just now probably better than I did
19 earlier which is you're not looking for individual clients to
20 represent. You're looking for the class -- the class to
21 represent. And of course there will be individuals within that
22 class. But there is a difference between submitting an
23 individual proof of claim, it's almost like opting out of the
24 class in the bankruptcy context, except that in this case, it's
25 not an opt out because there was a bar date. So people are

1 opting in to treatment under the Bankruptcy Code, but not
2 necessarily in the class treatment.

3 So if there was no authority to file the individual
4 claim, I think the individual claim has to be stricken. I just
5 don't see how I have a claim that can be asserted against the
6 debtor when there's no authority to file that claim. So as to
7 the individual claims, I have the same view, whether it's in-
8 state or out-of-state. If there's no authority by the
9 individual to file the claim, I don't see how there is a proper
10 claim.

11 With respect to the in-state class claim, I think
12 that should abide the hearing on the motion to certify. And
13 with respect to the out-of-state class claim, I will also let
14 that abide the hearing on the motion to certify, but I have a
15 slightly different issue. And that is that if there are no
16 individual out-of-state claims that have been filed that could
17 even be in that putative class, and the bar date's passed, I
18 don't see how it's possible to have a class. But again, I'm
19 happy to address that issue. That's my concern.

20 MS. BROWDY: Your Honor, may I ask the Court an issue
21 that has been raised?

22 THE COURT: One minute, please. Mr. Speights?

23 MR. SPEIGHTS: I understand where you are, Your
24 Honor. Thank you very much.

25 MS. BROWDY: Your Honor, we'll submit an order

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1 striking and expunging all the individual class -- individual
2 claims purportedly submitted under Anderson whether in-state or
3 out-of-state. Those are all the claims listed in the
4 attachments as Exhibit 1 and Exhibit 2 in our opening brief.
5 So we understand Your Honor's opinion on that.

6 As to this new motion to certify an in-state and out-
7 of-state class, though, Your Honor, I mean, we need to take a
8 step back and look at what's going on here. I mean, the
9 debtors came to this Court in 2001 and said we want a notice
10 and a bar date on property damage claims so we can figure out
11 what the extent of the potential liability is and sort it out.
12 It was --

13 THE COURT: I agree, Ms. Browdy, I do agree. The
14 problem is this. I haven't read that transcript, so maybe
15 somebody can refresh my recollection whether I dealt with the
16 issue at that time of whether the notice that went out should
17 say that a class -- that this was a bar date for class proofs
18 of claim. I think I did not address the issue of class proofs
19 of claim because what I had expected to come in was a motion to
20 certify a class, if, in fact, there was going to be a class
21 proof of claim.

22 MS. BROWDY: Exactly, Your Honor. That's exactly the
23 point. You said this should go out -- a notice should go out
24 and we spent millions of dollars on this and if the property
25 damage claimants wanted to bring a class proof of claim issue

1 up, too, that was the time to do it. And I think --

2 THE COURT: But what I've --

3 MS. BROWDY: -- that the briefing that we would do
4 now is going to show that to you. But --

5 THE COURT: Well, I think the issue is different now.
6 I believe the issue is this. The notices have gone out for
7 every individual who thinks, believes, whatever the appropriate
8 word is -- contends, I guess, that's a good one, that there is
9 a claim against the debtor to file a proof of claim. Okay. If
10 that individual, those individuals have not filed a proof of
11 claim, the fact that they haven't filed a proof a claim, I
12 think, automatically means they can't be part of a class
13 because you can't -- if you've been given a bar date and you
14 have not acted to file a proof of claim, the fact that somebody
15 else has filed a proof of claim for a class isn't going to get
16 you into it because you've denied that you have a claim by not
17 filing it, I think.

18 But that's the issue that I think you need to brief
19 for me because I am not sure what the consequence of not filing
20 an individual claim, but potentially being part of the class
21 is. And I am not going to jeopardize claimants who may have
22 claims against the debtor without having that issue briefed and
23 an opportunity to rule on it.

24 MS. BROWDY: Okay, Your Honor. And that argument is
25 going to be set for hearing on December 19th?

1 THE COURT: I don't know. It's whenever -- I haven't
2 even seen the motion to certify yet. So, you know, whenever it
3 gets scheduled under the normal scheduling matters, that's when
4 it will --

5 MS. BROWDY: Okay. Because again, I just want to
6 point out, our concern about the delays being imposed on the
7 debtors' case by the Speights firm.

8 THE COURT: Wait, now wait. When was this case
9 filed? I don't want to hear delays. I don't have -- at the
10 moment, I'm not even to the point where we have a plan that's
11 set for a plan confirmation hearing because there are still
12 issues that are being discussed. So delay is not the concern.

13 MS. BROWDY: I believe we may have a form of order to
14 hand up. Let me double check, Your Honor.

15 THE COURT: All right. Show it to Mr. Speights if
16 it's some change that's been made.

17 || (Pause)

23 MS. BROWDY: Yeah, I just don't want the class
24 certification -- you know, Mr. Speights has raised the issue,
25 gee, we may need to take discovery. I mean, it's just going to

1 get dragged on and on. The whole point is we started with a
2 huge number of claims. We're getting rid of them. We've cut
3 them in half. It's getting smaller and smaller. And they're
4 going to try to use the issue of an open class certification to
5 open the door wide open again.

6 THE COURT: Well, I think I need a brief on what I
7 believe to be a legal issue which is with the bar date having
8 past and you now know the universe of individual claims, how
9 the class can be any bigger than the individual claims because
10 it seems to me if the bar date notice was appropriate, and I
11 found that it was, that's why I let it go out, and an
12 individual hasn't filed a proof of claim, then they can't be
13 part of a class because they haven't submitted a claim, I
14 think. But I want that issue briefed.

15 MS. BROWDY: Yes, Your Honor. Well, perhaps we
16 should check the Court's calendar and see if there is a special
17 setting that we could have. Again, we'd be happy to address it
18 on the December 19th hearing, but I know a lot of things tend
19 to pile up on the Court's calendar for those omnibus hearings.

20 THE COURT: Yeah, is that the hearing in which the
21 responses and everything would be due?

22 MS. BROWDY: That's in --

23 MR. FAIREY: According to the schedule on order,
24 that's correct, Your Honor.

25 THE COURT: Okay. So do you want to file a response

1 earlier so I can get you an earlier date or --

2 MS. BROWDY: Let's see, our responses currently would
3 be due December 2nd, I believe. I think we can make December
4 2nd and do a December 19th hearing. If the Court has an
5 earlier date, we'll write our briefs earlier.

6 THE COURT: Okay. November 9th is not available,
7 Mona, regardless of what it says on there.

8 MS. BROWDY: Oh, Your Honor, I'm supposed to be in
9 trial through Thanksgiving, too, so November is going to be
10 hard.

11 THE COURT: Oh, well then, there isn't much reason to
12 worry about it before December 19th if that's the case.

13 MS. BROWDY: Okay.

14 THE COURT: All right. We'll just put it on the 19th
15 calendar. One of the cases that's normally set for hearing
16 that day, they notified me the other day they're not going to
17 have any matters going forward. I do -- was that USG?
18 Armstrong? U.S. Mineral? So that, if need be, it's possible
19 that I can continue the argument till that times lot, but I'll
20 have to double check to see which case it is to see how I can
21 juggle the times.

22 MS. BROWDY: Thank you, Your Honor. And we'll again,
23 can fill out a form of order.

24 MR. SPEIGHTS: Your Honor, our counsel and I just
25 started looking at this because I didn't want to be

1 inattentative of the exchange with the Court, and counsel has
2 already said there need to be some changes to this.

3 THE COURT: All right. Why don't you just submit it
4 on a certification of counsel.

5 MR. SPEIGHTS: I would appreciate that, Your Honor.

6 THE COURT: All right. If you can't do it on --

7 MR. SPEIGHTS: I'm -- and I'll be glad to meet with
8 Ms. Browdy after the hearing to see if we can hammer it out.

9 THE COURT: All right. That's fine.

10 MS. BROWDY: Yes, Your Honor. But again, we just
11 want to make sure that it's done promptly. Obviously we have a
12 number of objections to these claims even beyond the authority
13 one. We want to make sure they're cleaned out of the system so
14 we don't have to keep dealing with these claims.

15 THE COURT: I understand. When you submit a
16 certification and go through the procedures, it will come to
17 me, we'll get an order signed. I -- you know, when I'm
18 delinquent with orders, nobody hesitates to tell me at the next
19 hearing that I've missed an order and I cure it promptly. So,
20 you get it done, I'll get it signed.

21 MS. BROWDY: Thank you, Your Honor.

22 THE COURT: All right. Anything else for today?
23 We're adjourned. Thank you.

24 MR. SPEIGHTS: Thank you, Your Honor.

25 * * * * *

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C E R T I F I C A T I O N

I, Susan Holcomb, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/ Susan Holcomb Date: November 7, 2005
Susan Holcomb AAERT CET **00273
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